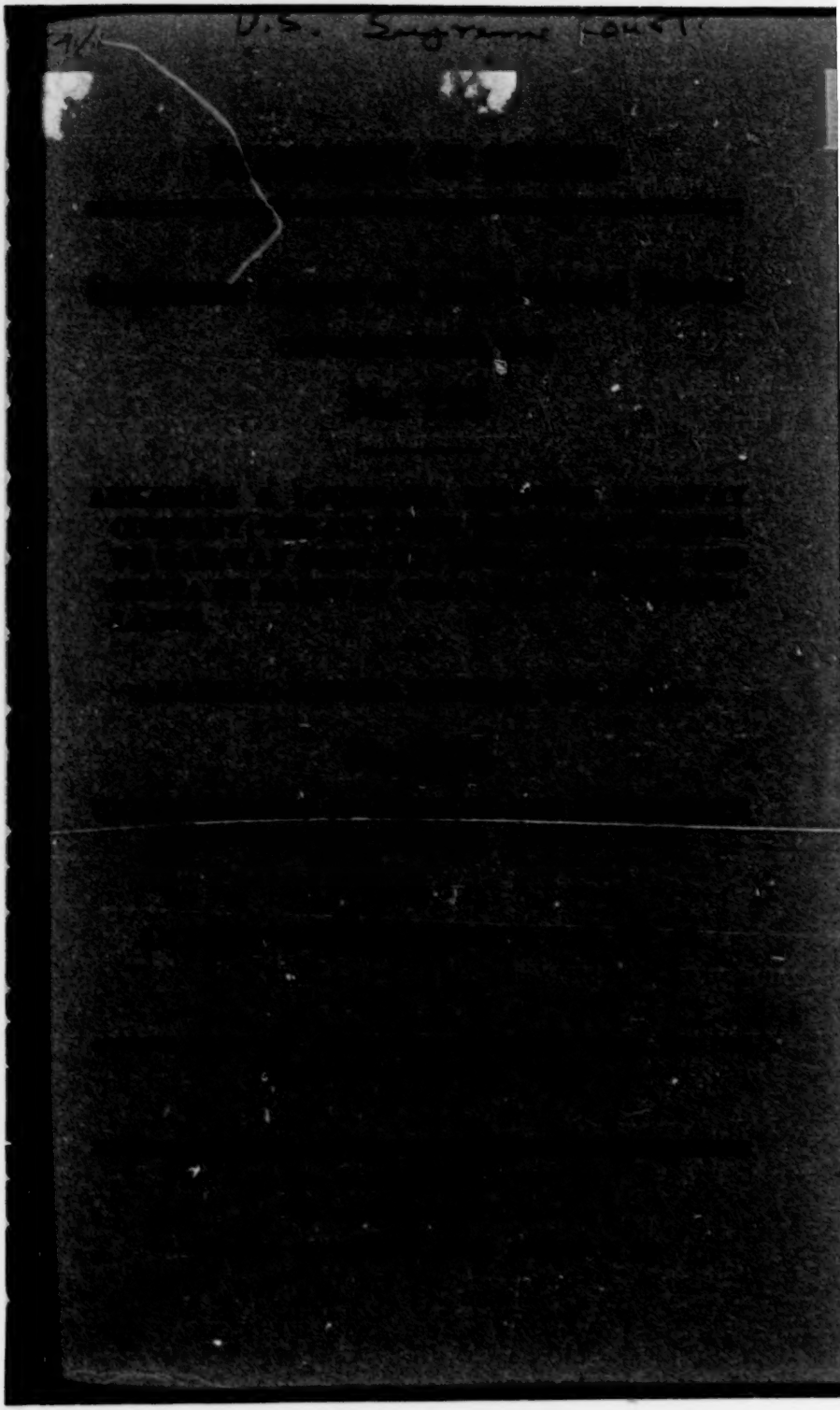

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 125

ARKANSAS & LOUISIANA MISSOURI RAILWAY COMPANY; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; GULF, COLORADO AND SANTA FE RAILWAY COMPANY, ET AL., APPELLANTS,

vs.

AMARILLO-BORGER EXPRESS, INC., ET AL.

No. 224

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

AMARILLO-BORGER EXPRESS, INC., ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

INDEX

	Original	Print
Record from the U.S.C.C. in and for the Northern District of Texas, Dallas Division	1	1
Caption (omitted in printing)	1	1
Original complaint	2	1
Corrected order of I.C.C. dated September 23, 1955 sustaining the petition of the motor carriers, etc.	6	4
Order of I.C.C. dated November 14, 1955 vacating and setting aside order of September 23, 1955, etc.	9	7

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DEC. 7, 1956

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	Original	Print
Record from the U.S.C.C. in and for the Northern District of Texas, Dallas Division—Continued		
Order denying temporary restraining order, etc	15a	12
Notice of and motion to dismiss by United States of America	16	13
Motion of the Southwestern Railroads for leave to intervene	28	14
Motion to dismiss by Southwestern Railroads	29	15
Appendix A—List of the Southwestern Railroads	30	16
Answer of the Southwestern Railroads	32	17
Appendix A—List of the Southwestern Railroads (Copy) (omitted in printing)	39	
Order allowing intervention of Southwestern Railroads as defendants	41	23
Motion of the I.C.C. for leave to intervene	55	24
Order allowing intervention of I.C.C. as defendant	57	24
Notice of and motion of the I.C.C. to dismiss	58	25
Affidavit of Lee Cisneros	61	26
Affidavit of Harry L. Brand	64	28
J. D. Spruill	65	29
R. J. Barlow	66	30
W. C. T. Utley	68	31
Arthur B. Strunk	70	32
Dean McCoy	72	34
Phil G. Abell	74	35
Neil G. Yow	76	36
Vernon Crenshaw	78	38
D. E. Sable	80	39
D. C. Armstrong	82	40
Virgil T. Springer	84	41
Opinion, Brown, J.	86	42
Judgment	103	59
Appendix A—List of the Southwestern Railroads (Copy) (omitted in printing)	106	
Motion for new trial by Southwestern Railroads	108	62
Motion for new trial by United States and I.C.C.	111	64
Order overruling motions for new trial	116	66
Notice of appeal by Southwestern Railroads	116a	67
Appendix A—List of the Southwestern Railroads (Copy) (omitted in printing)	116d	
Notice of appeal by United States of America and I.C.C.	117	69
Clerk's certificate (omitted in printing)	122	
Order noting probable jurisdiction	123	71

[fol. 1] Caption omitted

[fol. 2] **IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION**

Civil Action No. 6289

AMARILLO-BORGER EXPRESS, INC., ET AL

vs.

UNITED STATES OF AMERICA

ORIGINAL COMPLAINT

To the Said Honorable Court:

Come now: Amarillo-Borger Express, Inc., a Texas corporation, with its principal offices in Amarillo, Texas;

Best Motor Freight, an Arkansas Corporation, with its principal offices in Dallas, Texas;

Knaus Truck Line, Inc., a Missouri corporation, with its principal offices in Kansas City, Missouri;

Leeway Motor Freight, Inc., a Delaware corporation, with its principal place of business in Oklahoma City, Oklahoma;

Merchant's Fast Motor Lines, Inc., a Delaware Corporation, with its principal place of business in Abilene, Texas;

Strickland Transportation Company, Inc., a Texas corporation, domiciled and with its principal place of business in Dallas, Texas;

Sunset Motor Lines, Inc., a Texas corporation, with its home office and principal place of business in San Angelo, Texas; and

Yellow Transit Freight Lines, Inc., an Indiana Corporation, with its principal place of business in Kansas City, Missouri.

[fol. 3] Each of said concerns is a Complainant herein. Each is a common carrier of property by motor vehicle as that term is defined in the Interstate Commerce Act. Each is authorized to transport and does transport carbon black in interstate commerce within the territory hereinafter described. Each has a justiciable interest in the matters hereinafter set out.

Complainants bring this action against the United States of America to annul and set aside an order of the Interstate Commerce Commission. The order involved is not one for the payment of money. In support of this action, Complainants here show:

I

This is an action brought under Sections 1336, 1398, 2284, and 2321-2325 of Title 28, United States Code, to set aside and annul an order by the Commission which said order was entered by the Interstate Commerce Commission purporting to act under the provisions of Section 15(7), Title 49, United States Code, but which action (for reasons hereinafter stated) was capricious, arbitrary, transcended the statutory and administrative power of the Commission and constituted an abuse of the discretion confided to the Commission. Complainant Strickland Transportation Company, Inc., is domiciled and has its principal place of business in Dallas, Texas, Dallas, Texas, is within the Dallas Division of the United States District Court for the Northern District of Texas. Hence, venue of this action is in this Court.

II

The subject matter out of which this controversy arose is carbon black and the freight rates applicable thereto.

This commodity is produced almost exclusively in that portion of the United States known in traffic circles as the Southwestern area. Texas is a leading producer. The principal consumers are tire manufacturers. One of the chief consuming points is Akron, Ohio.

Prior to 1954, the rail carriers and the motor carriers [fol. 4] had maintained on carbon black, a scale of rates that were substantially the same. A typical illustration was the rate from shipping points located in the Texas Panhandle to Akron, Ohio. The pre-1954 rate via motor was $1.53 per hundred pounds. The rail rate was approximately $1.56. (The difference was because of the difference in general increases.)

Early in 1954 the rail carriers published schedules which provided for them a differential under the motor carriers. As an illustration, the rail rate from Panhandle origins to

Akron, Ohio, was reduced to $1.4785 per hundred pounds, or 5.15¢ below the motor carrier rate. This reduction was permitted to become effective.

Thereafter, the motor carriers, including complainants, filed schedules designed to meet this new scale and to restore the parity that had theretofore existed. Complainants' schedules were, however (upon petition of the rail carriers) suspended by the Interstate Commerce Commission. The Commission ordered an investigation, and hearing was had in July, 1954. The examiner hearing the matter recommended that the Commission find the motor carriers' reduction justified and lawful. The rail carriers filed exceptions to the report and the matter is still pending and undecided before the Interstate Commerce Commission. The seven months' period for suspension having expired the motor carriers (as is customary in such cases) agreed that the period of suspension would be extended until the matter was determined by the Commission. The effect of this is to freeze the motor carrier rates at their pre-1954 level until the termination of the Commission's investigation.

Following this, and by tariffs published to become effective September 24, 1955, the rail carriers (though already lower than the motor carriers as heretofore shown) proposed to establish a new schedule of rates drastically reduced below the rails' own then reduced scale. A typical illustration is the rates from the Panhandle area to Akron, [fol. 5] Ohio. Under the rails first reduced scale (which motor carriers have not been permitted to reach) the rate was $1.4785 per hundred pounds. The new schedule proposes a rate of $1.33 per hundred pounds. This, as opposed to complainants' frozen rate of $1.53.

III

The motor carriers, including these complainants, acting by and through their several tariff bureaus (Middlewest Motor Freight Bureau, Southwestern Motor Freight Bureau, Inc., Southern Motor Carriers Rate Conference, and others) timely filed petitions with the Interstate Commerce Commission, asking that the Commission suspend the reduced schedules by the rail carriers because they were

unlawful in that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of the National Transportation policy. Replies thereto were filed by interested parties and a conference had on the matter before the Suspension Board of Interstate Commerce Commission on September 21, 1955, in Washington, D. C.

IV

Thereafter, and on September 23, 1955, the Interstate Commerce Commission issued its order sustaining the petition of the motor carriers, including these complainants, suspending the proposed new schedules and directing an investigation. Said order of the Commission is here photographically reproduced as follows:

[fol. 6] Corrected Order of Interstate Commerce Commission

At a Session of the Interstate Commerce Commission, Division 2, acting as an appellate division, held at its office in Washington, D. C., on the 23rd day of September, A. D., 1955.

Investigation and Suspension Docket No. 6476

Carbon Black—Southwest to U.S.A. & Canada

It appearing, That there have been filed with the Interstate Commerce Commission tariff schedules setting forth new reduced rates and charges, and new rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce, to become effective September 24, 1955, and later, designated as follows:
F. C. Kratzmeir, Agent, I.C.C. 3744:

In Supplement 157 thereto, on page 8 thereof, Item 75-A insofar as it would expire rates referenced encircled "E" held in force by reason of this suspension or make effective rates referenced encircled "226" scheduled to replace such expiring rates, throughout the tariff.

In Supplement 161 thereto, on pages 2 through 29 thereof, all COLUMN D rates, on page 24 thereof, Note A and the explanation thereof, also, on pages 25 through 29 thereof, Note B and the explanation thereof;

In Supplement 163 thereto, on pages 5 through 27 thereof, all COLUMN D rates, on pages 28 through 32 thereof, in ITEMS 220-N, 222-N, 224-M, 226-L, 228-L, 230-L, 232-K, 233-G and 234-J, all COLUMN D rates, on page 27 thereof, Note A and explanation thereof, also, on pages 28 through 32 thereof, Note B and explanation thereof;

Supplement 164 in full;

In Supplement 165 thereto, on pages 2 through 7 thereof, all COLUMN D rates, on pages 3, 4 and 6 thereof, changes in headings insofar as they remove expiration reference encircled "E" applicable in connection with rates held in force by reason of this suspension.

J. F. Brown, Agent, I.C.C. 851:

In Supplement 20 thereto, on pages 6 and 7 thereof, in ITEM 4320-B, all reduced rates, also in Item 4340-B, COL. D rates;

In Supplement 24 thereto, on pages 9 and 10 thereof, in ITEM 4320-B, all rates subject to min. 65,000 pounds, also in ITEM 4340-B, all COL. D rates.

[fol. 7] J. F. Brown, Agent, I.C.C. 865:

In Supplements 1 and 2 thereto, on page 3 thereof, in ITEM 635-A, all COL. D rates;

In Supplement 4 thereto, on page 3 thereof, in ITEM 635-B, all COL. D rates.

And it further appearing, That upon consideration of the said schedules and protests thereto there is reason to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the

Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy; and good cause appearing therefor:

It is ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges and regulations contained in said schedules, with a view to making such findings and orders in the premise as the facts and circumstances shall warrant.

It is further ordered, That the operation of the said schedules be and it hereby is suspended, that the use thereof on interstate and foreign commerce be deferred to and including April 23, 1956, unless otherwise ordered by this Commission.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said schedules under the Interstate Commerce Act.

It is further ordered, That neither the schedules hereby suspended nor those sought to be altered thereby shall be changed until this proceeding has been disposed of or until the period of suspension has expired, unless otherwise ordered by the Commission.

And it is further ordered, That a copy of this order be filed with the schedules in the office of the Interstate Commerce Commission, and that copies hereof be forthwith served upon the carriers parties to the said schedules and that the said carriers be, and they are hereby, made respondents to this proceeding.

By the Commission, Division 2, acting as an appellate division.

(Seal) Harold D. McCoy, Secretary.

[fol. 8]

V

Pursuant to its order of September 23, 1955, the Commission did under date of November 1, 1955, order that a hearing be had on the issues involved, said hearing to commence at Dallas, Texas, on November 29, 1955.

VI

Thereafter, on November 14, 1955, the Commission, without any further hearing, entered an order which is photographically reproduced as follows:

[fol. 9] Order of Interstate Commerce Commission—November 14, 1955

At a Session of the Interstate Commerce Commission, Division 2, acting as an appellate division, held at its office in Washington, D. C., on the 14th day of November, A.D., 1955.

Investigation and Suspension Docket No. 6476

Carbon Black—Southwest to U.S.A. & Canada

It appearing, That by an order dated September 23, 1955, the Commission, Division 2, acting as an appellate division, entered upon an investigation concerning the lawfulness of certain rates and charges and the regulations and practices stated in schedules designated therein, and suspended the operation of the said schedules to and including April 23, 1956;

It further appearing, That consideration has been given to petitions of the respondents requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor:

It is ordered, That the said order of September 23, 1955, be, and the same is hereby, vacated and set aside as of November 24, 1955, insofar as it suspended the operation of the schedules designated therein, but that the proceeding of investigation of said schedules shall continue in full force and effect.

By the Commission, Division 2, acting as an appellate division.

(Seal) Harold D. McCoy, Secretary.

[fol. 10] The effect of the order of November 14, 1955, is to permit the assailed schedules to become effective, thereby changing the status quo while the investigation as to their lawfulness is being continued.

VII

The action of the Commission in entering the order of November 14, 1955, is arbitrary, capricious, in contravention of the Commission's statutory and administrative power and constitutes an abuse of the discretion confided in the Commission pursuant to Section 15(7), Part I, Interstate Commerce Act because:

(1) The order shows on its face that it was entered merely because the rail respondents requested it.

(2) There is an entire lack of the basic or essential findings of fact required under the law to support an order of the Interstate Commerce Commission.

(3) The Commission does not make any effort in its order of November 14, 1955, to set aside the findings of fact made by it in its order of September 23, 1955. On the contrary, the facts found to exist, in the order of September 23, 1955, are, by necessary implication, reaffirmed as findings of fact by the Commission in its order of November 14, 1955.

(4) By the very nature of the findings made by the Interstate Commerce Commission it is manifest that the Commission has found that the rates proposed by the rail carriers named in the order are probably unlawful; that they would, if permitted to become effective, result in unfair and destructive competitive practices in contravention of the National Transportation Policy. It is further manifest by the very nature of the facts found that immediate and irreparable injury will be done to the complainants herein if the status quo be not preserved during the period of the investigation. Hence, the Commission abused its discretion in withdrawing from the complainants the protection of the suspension order.

[fol. 11]

VIII

Under date of November 16, 1955, the Interstate Commerce Commission issued an order indefinitely postponing the hearing which had been set for November 29, 1955, to inquire into the lawfulness of said rates. The order of indefinite postponement recited that it was done at the request of the respondent railroads.

IX

Complainants here show that although the order here attacked was issued, as stated, on November 14, 1955, complainants herein did not learn of said order having been issued until the latter part of that week and then only by indirection. Diligent inquiries were promptly made but it was not until Monday, November 21, 1955, that complainants herein were able to secure a copy of said order. This suit is filed with all possible diligence following receipt of the intelligence and learning of the basis (or lack of it) for the Commission's action.

X

Here the complainants show to the Court that immediate and irreparable injury is certain to ensue to the complainants if the order here under attack is permitted to become effective. In this connection the complainants show to the Court that unless a temporary restraining order and a temporary injunction is issued the reduced rates will be permitted to become effective at midnight, on November 23, 1955. If this is permitted to happen, complainants have already been advised that carbon black traffic heretofore and now being handled by them will be diverted to railroads. Complainants herein are presently receiving revenues in excess of $1,000.00 per day for transporting carbon black traffic affected by this proceeding. As stated, they are threatened with immediate loss of the whole of this revenue which loss will continue and which is irreparable.

XI

Complainants here show to the Court that carbon black is [fol. 12] a very important commodity being handled in the service of complainants. The movement of their traffic is predominantly from the North and East to the South and Southwest. Carbon black assumes an importance even out of proportion to its volume because it is one of the very few commodities available for transportation from the Southwestern areas to gateways in the North, such as St. Louis, Chicago and Memphis. Diversion of this traffic, even if temporary, and even if confined to the period while the lawfulness of the rail rates are under investigation, would

produce a severe and substantial financial loss to these complainants. By the very nature of the loss it is irreparable because it could never be recovered. Since the Commission has now indefinitely postponed any hearing this loss would continue to accrue for an indefinite time in the future. Processes of the Interstate Commerce Commission are, at best, slow. In this connection complainants show that the motor carrier rates under suspension have been under investigation for 18 months and no decision is yet in sight.

XII

Complainants here show that irreparable damage to complainants is so certain and so immediate that the Judge to whom this petition is presented should issue forthwith a temporary restraining order to preserve the status quo until such time as the three-judge court may be convened to hear the application for interlocutory injunction. In addition to the facts heretofore recited, complainants show that an immediate temporary restraining order is imperative because:

(1) The order of the Commission under attack permits the schedules of the rail carriers, already published, to become effective at midnight, November 23, 1955.

(2) Once the schedule becomes effective there is considerable doubt whether even a subsequent setting aside of the Commission's order could, in law, have the effect of cancelling the schedules.

(3) While the statute confides to the Commission the dis- [fol. 13] cretion as to whether or not a schedule is to be suspended, the Commission is obligated under the law to exercise discretion. Where, as here, the Commission has found as facts that the assailed schedules are probably unlawful and will likely result in unfair, destructive competitive practices; and where, as here, it necessarily follows that such action would cause immediate and irreparable injury to the competing motor carriers; and where, as here, the Commission based upon the facts above stated, did order the rates suspended, it is an abuse of the Commission's discretion, without fact findings and without hearing, to withdraw from the complainants the protection of the

preservation of the status quo; which protection the facts found entitle the complainants to receive.

(5) The grant of the temporary restraining order and an interlocutory injunction would mean preservation of the status quo until such time as the issues of law herein could be determined. As hereinbefore shown, the rail carrier respondents already enjoy some rate differential in their favor by reason of the prior investigation and suspension proceeding not yet determined. The considered traffic is now moving freely by both means of transportation, rail and motor carrier. Furthermore, the assailed rates have been under suspension by virtue of the Commission's order for the past 49 days and the only effect of a temporary restraining order would be to keep in effect for a few days longer the order of the Commission dated September 23, 1955, unmodified by the order of November 14, 1955. Therefore, no injury could result to any person adversely interested in this controversy.

Wherefore, premises considered, complainants pray the Court as follows:

(1) That a three-judge court be convened pursuant to Sections 2284, 2321-2325 of the Judicial Code.

(2) That pending the assembling of the court and to prevent irreparable damage the District Judge to whom this [fols. 14-15] petition is presented forthwith issue a temporary restraining order which shall remain in effect only until the hearing and determination by the full court on the application for interlocutory injunction and which shall suspend temporarily and enjoin the effectiveness, temporarily, the order of November 14, 1955, so far as it purported to modify the Commission's order of September 23, 1955.

(3) That the three-judge court set down for hearing at the earliest practicable date the matter of the issuance of an interlocutory injunction continuing in effect the relief sought by the temporary restraining order until such time as final judgment on the merits of this complaint can be heard and determined by the said three-judge court.

(4) That on final hearing hereof, this Court issue an

order annulling, vacating, and setting aside the order of the Interstate Commerce Commission dated November 14, 1955, and decreeing that the order of September 23, 1955, shall remain in effect unmodified by the purported action of November 14, 1955, here assailed.

(5) That appropriate process issue in connection with all relief sought herein, interlocutory or final.

(6) That complainants herein have such other and further relief at law or in equity to which they may be justly entitled under the law and the facts.

Respectfully submitted, Ralph W. Currie, Attorney for Complainants

---

Duly sworn to by Virgil T. Springer. Jurat ommitted in printing.

[fol. 15a] In United States District Court

Order Denying Temporary Restraining Order; etc.—November 23, 1955

On this 23rd day of November, 1955, there having been presented to the undersigned District Judge the request of the complainants herein for a temporary restraining order and request for setting on plaintiff's application for interlocutory injunction; complainants appearing by counsel and the defendant appearing by Honorable John C. Ford, Assistant United States Attorney:

And it appearing to the Court that no damage will be done to the complainants until such time as the application for interlocutory injunction can be heard, and that said application for interlocutory injunction should be heard at the earliest practical date, which date the Court here fixes as December 9, 1955 at 10:00 o'clock before noon:

It is, therefore, ordered that plaintiff's application for temporary restraining order be denied, but that its application for interlocutory injunction be and the same is hereby set to be heard by a three Judge Court pursuant to law on

December 9, 1955 beginning at 10:00 o'clock A.M. in the United States District Courtroom in Dallas, Texas.

Entered this 23rd day of November, 1955.

Wm. H. Atwell, United States District Judge

Approved as to form:

Ralph W. Currie,
Attorney for Complainants
John C. Ford, Assistant
United States Attorney
Attorney for Defendant

[fol. 16] In United States District Court

Notice of Motion by the United States of America

Please take notice that the United States of America will bring on the attached motion to be heard at the hearing set for December 12, 1955, in the above-entitled action.

(S) Stanley M. Barnes, Assistant Attorney General; (S) Heard L. Floore, United States Attorney; (S) John C. Ford, Assistant United States Attorney; (S) James E. Kilday, (S) Albert Parker, (S) Earl E. Pollock, Attorneys, Department of Justice.

Attorneys for Defendant United States of America

[fols. 17-27] IN UNITED STATES DISTRICT COURT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

Civil Action No. 6289

AMARILLO-BORGER EXPRESS, INC., ET AL., Plaintiffs,

v.

UNITED STATES OF AMERICA, Defendant,

and

INTERSTATE COMMERCE COMMISSION, Intervening Defendant.

MOTION TO DISMISS BY UNITED STATES OF AMERICA

Now comes the United States of America, defendant in the above-entitled action, and moves the Court to dismiss the complaint for lack of jurisdiction of the subject matter, on the grounds: (1) that the suspension of new rate schedules is a matter wholly within the discretion of the Interstate Commerce Commission; (2) that the plaintiffs have not exhausted their administrative remedies; (3) that the relief sought by the plaintiffs is now beyond the power of the Commission to grant.

(S) Stanley M. Barnes, Assistant Attorney General; (S) Heard L. Floore, United States Attorney; (S) John C. Ford, Assistant United States Attorney; (S) James E. Kilday, (S) Albert Parker, (S) Earl E. Pollock, Attorneys, Department of Justice.

Attorneys for Defendant United States of America

[fol. 28] IN UNITED STATES DISTRICT COURT

MOTION OF THE SOUTHWESTERN RAILROADS FOR LEAVE TO INTERVENE

Come now the Southwestern Railroads, as listed in Appendix A to the Motion to Dismiss and Answer copies of which are hereto attached, and move for leave to intervene

as Defendants in this action in order to assert claims and defense set forth in their Motion to Dismiss and Answer and to secure the relief sought in such pleading on the ground that their rates on carbon black are under attack in this action and that representation of their interests by existing parties is or may be inadequate and they will be bound by a judgment in the action.

William R. McDowell, Attorney for Southwestern Railroads, Texas & Pacific Building, 1025 Elm Street, Dallas, Texas.

[fol. 29] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS

To the Honorable Judges of said Court:

Come now, the Southwestern Railroads, Party-Defendants, and file this their Motion to Dismiss the above-entitled and numbered cause for reasons as follows:

I

This Court is without jurisdiction in this action because the power of granting or denying suspension of new rates as authorized and provided in Section 15(7) of the Interstate Commerce Act (49 U.S.C.A. 15(7)) is vested exclusively in the Interstate Commerce Commission and the Court is without power to review the exercise by the Commission of its administrative discretion with respect thereto.

II

The complaint fails to state a claim upon which relief can be granted because the order involved is an interlocutory one, preliminary to investigation and to a determination of the matter to be investigated; hence, it is not a final and definitive order which is reviewable by the Court.

Wherefore, the Southwestern Railroads, Party-Defendants, pray that the complaint be dismissed.

William R. McDowell, Attorney for Southwestern Railroads.

[fol. 30] APPENDIX A TO MOTION TO DISMISS

The Southwestern Railroads are as follows:

Arkansas & Louisiana Missouri Railway Company.
The Atchison, Topeka and Santa Fe Railway Company.
Gulf, Colorado and Santa Fe Railway Company.
Panhandle and Santa Fe Railway Company.
Chicago, Rock Island and Pacific Railroad Company.
The Colorado and Southern Railway Company.
Fort Worth and Denver City Railway Company.
Illinois Central Railroad Company.
The Kansas City Southern Railway Company.
Louisiana & Arkansas Railway Company.
The Arkansas Western Railway Company.
Fort Smith and Van Buren Railway Company.
Midland Valley Railroad Company.
Kansas, Oklahoma & Gulf Railway Company.
Oklahoma City-Ada-Atoka Railway Company.
Missouri-Kansas-Texas Railroad Company.
Missouri-Kansas-Texas Railroad Company of Texas.
Beaver, Meade and Englewood Railroad Company.
Missouri Pacific Railroad Company (Guy A. Thompson, Trustee).
Asherton and Gulf Railway Company (Guy A. Thompson, Trustee).
Asphalt Belt Railway Company (Guy A. Thompson, Trustee).
The Beaumont, Sour Lake & Western Railway Company (Guy A. Thompson, Trustee).
Doniphan, Kensett & Searcy Railway.
Houston and Brazos Valley Railway Company (Guy A. Thompson, Trustee).
International-Great Northern Railroad Company (Guy A. Thompson, Trustee).
Natchez & Southern Railway Company (Guy A. Thompson, Trustee).
New Iberia & Northern Railroad Company (Guy A. Thompson, Trustee).
New Orleans and Lower Coast Railroad Company.
New Orleans, Texas & Mexico Railway Company (Guy A. Thompson, Trustee).

The Orange & Northwestern Railroad Company (Guy A. Thompson, Trustee).

[fol. 31] Rio Grande City Railway Company (Guy A. Thompson, Trustee).

The St. Louis, Brownsville and Mexico Railway Company (Guy A. Thompson, Trustee).

San Antonio Southern Railway Company (Guy A. Thompson, Trustee).

San Antonio, Uvalde & Gulf Railroad Company (Guy A. Thompson, Trustee).

San Benito and Rio Grand Valley Railway Company (Guy A. Thompson, Trustee).

Sugar Land Railway Company (Guy A. Thompson, Trustee).

St. Louis Southwestern Railway Company.

St. Louis-San Francisco Railway Company.

St. Louis, San Francisco and Texas Railway Company.

Quanah, Acme & Pacific Railway Company.

Southern Pacific Company.

Texas and New Orleans Railroad Company.

The Texas and Pacific Railway Company.

Abilene & Southern Railway Company.

The Denison and Pacific Suburban Railway Company.

Texas-New Mexico Railway Company.

Texas Short Line Railway Company.

The Weatherford, Mineral Wells and Northwestern Railway Company.

The Texas Mexican Railway Company.

[fol. 32] IN UNITED STATES DISTRICT COURT

ANSWER OF THE SOUTHWESTERN RAILROADS

The Southwestern Railroads, as listed in Appendix A hereto attached, and intervening Defendants in the above-entitled and numbered action, without waiving their Motion to Dismiss, and now, and at all times hereafter, saving and reserving to themselves any and all manner of benefit and advantage of exception to the many errors and insufficiencies in the complaint contained, for answer thereunto, or

unto so much as such parts thereof as they are advised that it is material for them to answer, answer and say:

First Defense

The Southwestern Railroads allege that this Court is without jurisdiction of this action for the reason that the power of suspension of new rates as authorized and provided by Section 15(7) of the Interstate Commerce Act (49 U.S.C.A. 15(7)) is vested exclusively in the Commission and the Court is without power to review the exercise by the Commission of its administrative discretion with respect thereto. The Southwestern Railroads further allege that the complaint fails to state a cause of action upon which relief may be granted.

Second Defense

Further answering the complaint, without waiving their Motion to Dismiss and the foregoing First Defense, the Southwestern Railroads answer and say:

[fol. 33] I

Answering the allegations of the first three unnumbered paragraphs of the complaint, the Southwestern Railroads admit the legal entity of the complainants, their principal place of business, their status as common carriers of property by motor vehicle, and the fact that each is authorized and does transport carbon black in interstate commerce within and from the territory involved in the complaint, but they deny that the complainants have a justiciable interest in this action.

II

Answering the allegations of the fourth unnumbered paragraph of the complaint, the Southwestern Railroads admit the same.

III

Answering the allegations of Paragraph I of the complaint, the Southwestern Railroads admit that this action is brought under the legal authorities referred to in said paragraph to set aside and annul a certain order entered by the Interstate Commerce Commission, but allege the

action is premature, and consequently, improperly brought. The Southwestern Railroads deny that the entry of said order was capricious, arbitrary or transcendent of the statutory and administrative power of the Commission or an abuse of the discretion confided to the Commission. To the contrary, the Southwestern Railroads allege that said order was legally, regularly, and properly entered in the exercise of the Commission's sound discretion and judgment, that it was duly filed and served, all pursuant to Section 15(7) of the Interstate Commerce Act (49 U.S.C.A. 15(7)), and all other applicable laws.

IV

Answering the allegations of Paragraph II of the complaint, the Southwestern Railroads admit that carbon black is produced almost exclusively in that part of the United States known as the Southwestern Area, that Texas is the [fol. 34] leading producer, that the principal consumers are tire manufacturers, and one of the chief consuming points is Akron, Ohio. The Southwestern Railroads deny that the rail carriers and the motor carriers have maintained, either before or after 1954, a scale of rates which were substantially the same, but allege that the motor carriers have attempted to justify a scale of rates applying on minimum weights of 16,000, 20,000, 22,500, and 28,000 pounds, corresponding to the railroads' scale applying on minimum weights of 25,440, 40,000, 50,000 and 65,000 pounds, respectively. The Southwestern Railroads further allege that the schedules in question provide for a reduction in rates for the transportation of carbon black, minimum weight 65,000 pounds, established upon the request of the National Gas Products Association, an association of the shippers of this commodity, and the Rubber Manufacturers Association, an association of the principal consumers of this commodity, to meet the economic needs of their business, and that the motor carriers can not and do not transport shipments of this weight. The Southwestern Railroads further allege that the action taken by the Commission in other proceedings for the suspension of rates are wholly immaterial and irrelevant to a consideration and determination of the issue presented here.

V

Answering the allegations of Paragraph III of the complaint, the Southwestern Railroads admit that motor carriers, including these complainants, acting by and through their several traffic bureaus, timely filed petitions with the Interstate Commerce Commission requesting the Commission to suspend the rate schedule filed by the railroads, and that replies thereto were filed by interested parties, including the shippers and the railroads. The Southwestern Railroads further admit that a conference was had on the matter before the Suspension Board of the Interstate Commerce Commission on September 21, 1955, in Washington, D.C., [fol. 35] but in this regard allege that despite the fact that the railroads had no notice of the conference and were not represented at the conference, the Suspension Board nevertheless declined to suspend the rate schedules involved here.

VI

Answering the allegations of Paragraphs IV, V, and VI of the complaint, the Southwestern Railroads allege that on the day following the action of the Suspension Board declining to suspend the proposed rate schedules, the motor carriers, including these complainants, without notice to or representation by the railroads, conferred with Division 2 of the Interstate Commerce Commission acting as an appellate division. On the day following this conference, i.e., September 23, 1955, Division 2 issued the order (photographically reproduced as a part of Paragraph IV of the complaint) suspending the proposed schedules and directing an investigation. The Southwestern Railroads further allege that following this order, and on October 13th and 18th, respectively, the National Gas Products Association and the Southwestern and Western Trunk Lines railroads petitioned the Commission for vacation of the suspension ordered by Division 2, to which petitions, replies were filed by the motor carriers, including these complainants. Thereafter, under date of November 1, 1955, the Commission assigned the docket for hearing on November 29, 1955, at Dallas, Texas. In view of the pendency of their petition to vacate the suspension, the Southwestern and Western Trunk

Lines railroads on November 8, 1955, requested a postponement of the hearing. On November 14, 1955, Division 2 of the Commission issued its order (photographically reproduced as a part of Paragraph IV to the complaint) sustaining the petitions of the railroads and the National Gas Products Association, vacating the suspension which it had previously ordered on the basis of the ex parte conference with the motor carriers.

[fol. 36] VII

Answering the allegations of Paragraph VII of the complaint, the Southwestern Railroads deny that the order of November 14, 1955, referred to in said Paragraph is unlawful or void for any of the reasons specified in said Paragraph or for any other reason. The Southwestern Railroads further allege that said order was legally, regularly, and properly entered in the exercise by it of sound discretion and judgment and that it was duly filed and served, all pursuant to the provisions of Section 15(7) of the Interstate Commerce Act (49 U.S.C.A. 15(7)), and all other applicable laws; that the Commission was and is empowered to enter the said order and the Commission did not exceed the authority conferred upon it by law in so doing; that said order is lawful and valid in all respects; that the reasons stated in said order for vacating and setting aside said order of September 23, 1955, are sufficient and meet fully all legal requirements; and that the complainants were duly served with a copy of the order.

The Southwestern Railroads further deny that there were any findings of fact made by Division 2 in its order of September 23, 1955, and allege that the statement "there is reason to believe" that the proposed schedules will have certain effects, which complainants ascribed as findings of fact, resulted from the motor carrier conference of September 22, 1955, with Division 2 of the Commission.

VIII

Answering the allegations of Paragraph VIII of the complaint, the Southwestern Railroads admit that under the date of November 16, 1955, the Interstate Commerce Com-

mission issued an order postponing the hearing which had been set for November 29, 1955, but deny that the postponement is indefinite, but rather it was postponed to a date to be hereafter fixed since the railroads requested only forty-five days to permit the Commission to act on their pending [fol. 37] petition to vacate the suspension and to permit them time to prepare for a hearing. The hearing has now been reassigned for February 2 and 3, at Dallas, Texas.

IX

Answering the allegations of Paragraph IX of the complaint, the Southwestern Railroads state that they have no information on which to admit or deny the allegations therein contained.

X

Answering the allegations of Paragraph X of the complaint, the Southwestern Railroads deny that any immediate or irreparable injury will ensue to the complainants if the order under attack is permitted to remain in effect.

XI

Answering the allegations of Paragraph XI of the complaint, the Southwestern Railroads admit that carbon black is a commodity being handled in service of complainants, but they have no information on which to admit or deny the allegations with respect to complainants' traffic flow or the importance of carbon black traffic to them. The Southwestern Railroads deny that the order will have the effect of producing substantial and irreparable financial loss to these complainants, and deny that a hearing on the rates has been indefinitely postponed. The Southwestern Railroads further deny that the processes of the Interstate Commerce Commission are slow as evidenced by the action in this case and allege that the time required for the Interstate Commerce Commission to investigate motor carrier rates in other proceedings for suspension are wholly immaterial and irrelevant to a consideration and determination of the issues presented here.

XII

Answering the allegations of Paragraph XII of the complaint, the Southwestern Railroads deny the same.
[fol. 38] Wherefore, the Southwestern Railroads pray that the relief sought by the complainants herein be denied and that the complaint be dismissed.

William R. McDowell, Attorney for Southwestern Railroads

[fols. 39-40] Appendix A to Answer (Copy)
Omitted. Printed side page 30 ante.

[fols. 41-54] In United States District Court

Order Allowing Intervention of Southwestern Railroads as Defendants—December 9, 1955

The Court having considered the Motion of the Southwestern Railroads for Leave to Intervene as Defendants in the above cause, and the Court having considered the Motion to Dismiss and Answer tendered therewith, and it appearing to the Court that the said Southwestern Railroads should be permitted to intervene as prayed, and the Court being duly advised in the premises,

It is Ordered, that the Southwestern Railroads have leave to intervene in this cause and are hereby made party-defendants and to that end, may file their Motion to Dismiss and Answer, and hereafter defend the order involved herein in the same manner and with like effect as if named as an original party.

Dated this the 9th day of December, 1955.

Wm. H. Atwell, United States District Judge

[fol. 55] IN UNITED STATES DISTRICT COURT

MOTION OF THE INTERSTATE COMMERCE COMMISSION FOR LEAVE TO INTERVENE

Pursuant to Rule 24 of the Rules of Civil Procedure, the Interstate Commerce Commission moves for leave to intervene as a party defendant in this action in order to assert the claims and defenses which it deems necessary in support of its action, on the ground that it is entitled to intervene on its own motion and as of right (28 U.S.C. 2323).

Interstate Commerce Commission, Robert W. Ginnane, General Counsel, H. Neil Garson, Attorney.

[fol. 56] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 57] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING INTERVENTION OF INTERSTATE COMMERCE COMMISSION AS DEFENDANT—December 7, 1955

The Court having considered the motion of the Interstate Commerce Commission for leave to intervene as a party defendant in the above cause, and it appearing to the Court that the said Interstate Commerce Commission should be permitted to intervene as prayed, and the Court being duly advised in the premises,

It is ordered, That the Interstate Commerce Commission have leave to intervene in this cause and is hereby made a party defendant, and to that end may file its answer and hereafter defend its order involved herein in the same manner and with like effect as if named as an original party.

Dated, December 7th, 1955.

Wm. H. Atwell, United States District Judge

[fol. 58] IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION BY THE INTERSTATE COMMERCE COMMISSION

Please take notice that the Interstate Commerce Commission will bring the attached Motion on to be heard at the regular meeting of the Court set for December 9, 1955.

H. Neil Garson, Attorney, Interstate Commerce Commission, Washington 25, D. C.; Bernard H. English, Attorney, Interstate Commerce Commission, Rm. 2104, 300 West Vickery St., Fort Worth 2, Texas; Robert W. Ginnane, General Counsel, Interstate Commerce Commission.

[fol. 59] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 60] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS BY THE INTERSTATE COMMERCE COMMISSION

Now comes the Interstate Commerce Commission, defendant in the above-entitled action, and moves the Court to dismiss the complaint and the motion for interlocutory injunction herein for lack of jurisdiction of the subject matter, for the reason that the action of the Commission complained of in the complaint is within the sole discretion of the Interstate Commerce Commission and for further reason that the plaintiffs have failed to exhaust their administrative remedies.

H. Neil Garson, Attorney, Interstate Commerce Commission, Washington 25, D. C.; Bernard H. English, Attorney, Interstate Commerce Commission, Rm. 2104, 300 West Vickery St., Fort Worth 2, Texas; Robert W. Ginnane, General Counsel, Interstate Commerce Commission.

[fol. 61] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF LEE CISNEROS

Before me, Beatrice Holloway, a notary public in and for Dallas County, Texas, on this day personally appeared Lee Cisneros, who being by me duly sworn, upon oath says:

My name is Lee Cisneros. I reside in Boston, Massachusetts. I am employed as General Traffic Manager of the Godfrey L. Cabot, Inc. I have been General Traffic Manager of Godfrey L. Cabot, Inc. for five years. Prior to that time I was employed by Cabot Carbon Company, the carbon black producing subsidiary of Godfrey L. Cabot, Inc. at Pampa, Texas, for a period of five years, as Shipping Department Supervisor. Cabot Carbon Company, a wholly-owned subsidiary of Godfrey L. Cabot, Inc., produces carbon black at its eight plants located in Texas, New Mexico, and Louisiana. Carbon black is produced from natural gas and petroleum hydrocarbons generally in the states of Texas, Louisiana, New Mexico, Oklahoma, Arkansas, and Kansas. The bulk of carbon black is consumed in the rubber manufacturing industry, which is primarily located in the territory north of the Ohio River and east of the Mississippi River. Approximately 95% of all carbon black produced in this country is used in the manufacture of rubber goods. The rest is consumed in ink and paint manufacture and other miscellaneous manufactured products. Cabot Carbon Company is a member of the National Gas Products Association. The National Gas Products Association is a voluntary, nonprofit organization consisting of the carbon black manufacturers who produce approximately 95% of all the carbon black manufactured in the United States. I am per-
[fol. 62] sonally associated with National Gas Products Association as a member of the carbon black Traffic Committee. I actively participate in the affairs of that Committee, and I am familiar with the action it takes in connection with rate proposals.

I am familiar with the schedules of railroad rates involved in the orders of the Interstate Commerce Commission dated September 23, 1955, and November 14, 1955, entitled "Investigation and Suspension Docket No. 6476, Carbon Black

—Southwest to U.S.A. and Canada." The rates involved in these schedules developed as a result of a request made by the Traffic Committees of National Gas Products Association and the Rubber Manufacturers Association, for the establishment of a lower basis of railroad rates. The request of the Traffic Committee of the National Gas Products Association was grounded upon the assertion that the rates in effect were unjust, unreasonable, in violation of Section 1 of the Interstate Commerce Act, unduly prejudicial and preferential and in violation of Section 3. The rail carriers entered upon a consideration of our request, numerous public hearings were heard and approximately 20 months later the schedules approved by the rail carriers were filed with the Interstate Commerce Commission, to become effective September 24, 1955. On September 21st a conference was held before the Suspension Board of the Interstate Commerce Commission with respect to these schedules. On September 22, 1955, the Suspension Board declined to suspend, but ordered an investigation as to the reasonableness and lawfulness of the rates. Before the Suspension Board's order could take effect, Division 2 of the Interstate Commerce Commission, acting as an Appellate Division, issued its order of September 23, 1955, suspending the schedules. Following this order, the Traffic Committee of the National Gas Products Association petitioned the Interstate Commerce Commission to vacate the suspension which it had previously ordered. On November 14th the I.C.C. issued its order vacating the suspension and continuing the investigation with the initial hearing set for February 2nd at Dallas, Texas. Following this action the rail carriers filed a supplement which had the effect of placing the rates into effect on November 24, 1955. The rates have been in effect since that time. Since November [fol. 63] 24th, out of approximately 18,000,000 pounds of carbon black originated at our plants moving by both rail and truck, only one diversion from truck to rail, consisting of 60,000 pounds, has been made.

Substantial tonnage moving by truck would seem to indicate that the level of the rate is not the sole determining factor in choosing a method of transport, for example: During the period of January through April, 1954, members of

National Gas Products Association shipped 901 truck loads, totaling 26,544,675 pounds via truck to midwest and eastern states, of which 20,551,857 pounds moved at motor rates higher than the 65,000 pound carload minimum rail rate. In some cases these rates were as much as 22 cents per hundred pounds higher than the rail rate.

Lee Cisneros

Subscribed and sworn to before me, by the said Lee Cisneros, this 12th day of December, 1955, to certify which witness my hand and seal of office.

My commission expires June 1, 1957.

Beatrice Holloway, Notary Public, Dallas County, Texas.

(Seal)

[fol. 64] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF HARRY L. BRAND

THE STATE OF TEXAS,
County of Dallas

Before me, Beatrice Holloway, a notary public in and for Dallas County, Texas, on this day personally appeared Harry L. Brand, who being by me duly sworn, upon oath says:

My name is Harry L. Brand. I reside in Caldwell, New Jersey, and I am employed as Director of Traffic by The J. M. Huber Corporation. I have been employed by the J. M. Huber Corporation more than sixteen years, the last six of which have been in my present capacity. The J. M. Huber Corporation produces carbon black in plants located at Eldon and Borger, Texas. I have noticed no diversion of carbon black from truck to rail since reduced rail rates became effective on November 24, 1955.

I have read the affidavit signed by Lee Cisneros of Godfrey L. Cabot, Inc., Boston, Mass., and concur fully in the statements contained therein.

Harry L. Brand

Subscribed and sworn to before me by the said Harry L. Brand, this 12th day of December, 1955, to certify which witness my hand and seal of office.

My Commission expires June 1, 1957.

Beatrice Holloway, Notary Public, Dallas County, Texas.

(Seal)

[fol. 65] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF J. D. SPRUILL

THE STATE OF TEXAS,
County of Dallas

Before me, Beatrice Holloway, a notary public in and for Dallas County, Texas, on this day personally appeared J. D. Spruill, who being by me duly sworn, upon oath says:

My name is J. D. Spruill. I reside at Garrison, New York, and I am General Traffic Manager of Columbian Carbon Co., New York. I have been employed by the Columbian Carbon Co. for the past six months. Prior to that time I was traffic manager for Binney & Smith, Inc., New York, N. Y., distributors of Carbon Black produced by Columbian Carbon Co. at plants located in Arkansas, Kansas, Louisiana, New Mexico, and Texas. Columbian Carbon Co. is a member of the National Gas Products Association. I am not aware of the diversion of carbon black tonnage from the truck carriers to the rail carriers because of the rail rates effective November 24, 1955.

I have read the affidavit of Lee Cisneros as made in this case, and subscribe to statements and information submitted.

J. D. Spruill

Subscribed and sworn to before me by the said J. D. Spruill, this 12th day of December, 1955, to certify which witness my hand and seal of office.

My commission expires June 1, 1957.

Beatrice Holloway, Notary Public, Dallas County, Texas.

(Seal)

[fol. 66] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF R. J. BARLOW

THE STATE OF TEXAS,
County of Dallas

Before me, Beatrice Holloway, a notary public in and for Dallas County, Texas, on this day personally appeared R. J. Barlow, who being by me duly sworn, upon oath says:

My name is R. J. Barlow. I reside in Amarillo, Texas. I am Traffic Manager for Continental Carbon Company and Continental Blacks, Inc. I have been Traffic Manager of Continental Carbon Company for the past five years and was Assistant Traffic Manager for the company for three years prior. Continental now owns and operates carbon black plants located in Texas, Oklahoma, New Mexico and Louisiana.

Continental is a member of the Traffic Committee of the National Gas Products Association. I am presently chairman of this committee and am familiar with the activities of the Committee actively participating in the affairs of the Committee on rate matters and particularly the rate adjustment causing the action at hand, namely, Investigation and Suspension Docket No. 6476, Carbon Black—Southwest to U.S.A. and Canada.

I have read the affidavit of Lee Cisneros, General Traffic Manager of Godfrey L. Cabot, Inc. concerning in general, (1) production, and distribution of carbon black; (2) the National Gas Production, Traffic Committee activities; (3) the handling of the case at hand by procedures outlined by Interstate Commerce Commission; (4) the statement of

truck shipments for January through April, 1954; and concur in said affidavit to that extent.

[fol. 67] The reduced rail rates that became effective on November 25, 1955, have not caused a diversion of traffic to the railroads from the motor carriers since they became effective, even though in most cases the rail rates are lower than the truck rates.

R. J. Barlow

Subscribed and sworn to before me by the said R. J. Barlow, this 12th day of December, 1955, to certify which witness my hand and seal of office.

My commission expires June 1, 1957.

Beatrice Holloway, Notary Public, Dallas County, Texas.

(Seal)

[fol. 68] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF W. C. T. UTLEY

THE STATE OF TEXAS,
County of Dallas

Before me, Beatrice Holloway, a notary public in and for Dallas County, Texas, on this day personally appeared W. C. T. Utley, who being by me duly sworn, upon oath says:

My name is W. C. T. Utley. I reside in Fort Worth, Texas, and I am employed as Traffic Manager of the Sid Richardson Carbon Co. I have been Traffic Manager of Sid Richardson Carbon Co. for two years and seven months.

Sid Richardson Carbon Co. ships carbon black by both rail carrier and motor carrier from its plant at Sid Richardson, Texas to the destinations involved in these proceedings.

Sid Richardson Carbon Co. is a member of the Natural Gas Products Association. I am personally associated with the Natural Gas Products Association as a member of the carbon black Traffic Committee. I actively participate in the affairs of that Committee and I am familiar with the action it takes in connection with rate proposals.

I am familiar with the schedules of railroad rates involved in the orders of the Interstate Commerce Commission dated September 23, 1955, and November 14, 1955, entitled "Investigation and Suspension Docket No. 6476, Carbon Black —Southwest to U.S.A. and Canada."

I have read the affidavit submitted by Lee Cisneros, Traffic Manager of Godfrey L. Cabot, Inc. in this case and I subscribe to and concur in all statements made in this affidavit as they relate to actions taken and information submitted by the Natural Gas Products Association.

[fol. 69] In the performance of my duties as Traffic Manager of Sid Richardson Carbon Co. I have personal knowledge of routings and types of carriers used in the transportation of carbon black from our plant to destinations involved in this case. Since November 24, 1955 there has not been any diversion of traffic from rail carriers to motor carriers in such shipments made by Sid Richardson Carbon Co.

W. C. T. Utley

Subscribed and sworn to before me by the said W. C. T. Utley, this 12th day of December, 1955, to certify which witness my hand and seal of office.

My commission expires June 1, 1957.

Beatrice Holloway, Notary Public, Dallas County, Texas.

(Seal)

[fol. 70] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF ARTHUR B. STRUNK

THE STATE OF TEXAS,
County of Dallas

Before me, Beatrice Holloway, a notary public in and for Dallas County, Texas, on this day personally appeared Arthur B. Strunk, who being my me duly sworn, upon oath says:

My name is Arthur B. Strunk. I am a resident of St. Louis, Missouri. I am employed by the Southwestern

Freight Bureau at St. Louis, Missouri. The Southwestern Freight Bureau is a voluntary, non-profit association of the Southwestern Rail Lines organized and operating under Section 5(a) of the Interstate Commerce Act. Among its duties it has the responsibility of preparing and publishing the joint line rate schedules for its members. I am a member of the Rate Committee of the Southwestern Freight Bureau and in such capacity I am familiar with the preparation and filing of rate schedules with the Interstate Commerce Commission. I have made a complete study and am thoroughly familiar with the rate schedules involved in the Interstate Commerce Commission's orders of September 23, 1955, and November 14, 1955, entitled: "Investigation and Suspension Docket No. 6476 Carbon Black—Southwest to U.S.A. & Canada."

Prior to the filing with the Commission of the rate schedules involved in this case, all of the published rates on carbon black were subject to an expiration date of December 31, 1955. The rate schedules involved here were not subject to any expiration date and superseded and canceled the prior 65,000 pound rates on carbon black which were subject to the expiration date of December 31, 1955. The order of September 23, 1955, suspended this schedule of rates but [fol. 71] continued in effect the rate on the 65,000 pound minimum weight subject to expiration date of December 31, 1955. The order of the Commission dated November 14, 1955, vacated the suspension of the schedule previously ordered by the Commission. Following this action the Southwestern Freight Bureau filed a rate schedule which had the effect of restoring as of November 24th the schedules which were suspended by the Commission. The Southwestern Freight Bureau thereafter published a new tariff schedule on November 28th, known as Supplement 170, bringing forward the 65,000 pound minimum rates together with other rates at lower minimum weights, all of which are not subject to an expiration date. This schedule of rates does not become effective until December 31, 1955.

If the order of the Commission dated November 14, 1955, is annulled the effect will be to cancel all rail rates on carbon black from the Southwest on 65,000 pound minimum until such time as Supplement 170 becomes effective on December

31, 1955. Furthermore, since the rate schedules contained in Supplement 170 are identical to those suspended in the Order of September 23, 1955, there is grave doubt that there will be any rail rates from the Southwest effective on a 65,000 pound minimum after that date.

Arthur B. Strunk.

Subscribed and sworn to before me, by the said Arthur B. Strunk, this 12th day of December, 1955, to certify which witness my hand and seal of office. My commission expires June 1, 1957.

Beatrice Holloway, Notary Public, Dallas County, Texas.

[fol. 72] IN UNITED STATES DISTRICT COURT

STATE OF TEXAS,
County of Dallas

Before me, the undersigned authority, a Notary Public in and for Dallas County, Texas, on this day personally appeared Dean McCoy, who, being by me duly sworn, states on oath as follows:

AFFIDAVIT

My name is Dean McCoy. I am Traffic Manager of Lee-Way Motor Freight, Inc., one of the complainants in the instant proceeding. L.W.M.F., Inc. (hereinafter identified as Lee Way) is a regular route motor common carrier of general commodities, operating in interstate and foreign commerce. It operates from and to St. Louis on the East, Kansas City on the North thru Tulsa and Oklahoma City to Amarillo, Borger, Dallas, Ft. Worth, Houston and San Antonio, on the west and south. Lee Way was one of the first motor carriers to transport carbon black from the Texas panhandle to Eastern manufacturing centers. For about 20 years it has been one of the principal motor carriers of carbon black. Lee Way's records show that from Jan. 1, 1955 through October 31, it originated 1640 loads of carbon black, weighing 45,920,000 lbs. The through revenue on this traffic amounted to more than $570,000.00.

In my association with carbon black producers and receivers over the past 10 years it is my judgment that the only factor considered in routing carbon black—truck or rail—is the level of the rates in cents per hundred pounds. This is the only thing which Lee Way can use to compete with the rails in transporting carbon black.

Lee Way will lose virtually all of its carbon black unless [fol. 73] its rates are on a parity in cents per hundred pounds with the rail's. Such a loss would seriously effect Lee Way's financial position and ability to continue its present operations.

Dean McCoy.

Subscribed and sworn to before me by Dean McCoy, to certify which witness my hand and seal of office this 12 day of December, 1955.

Lee Binion, Notary Public, Dallas County, Texas.

My commission expires 6-1-57.

[fol. 74] IN UNITED STATES DISTRICT COURT

STATE OF TEXAS,
County of Dallas

Before me, the undersigned authority, a Notary Public in and for Dallas County, Texas, on this day personally appeared Phil G. Abell, who, being by me duly sworn, states on oath as follows:

AFFIDAVIT

My name is Phil G. Abell. I reside at Dallas, Texas. I am Division Superintendent for Sunset Motor Lines, a motor common carrier engaged in the interstate transportation of property for hire, and a complainant in this proceeding. My company actively solicits the business of transporting the commodity known as "Carbon black", and does transport said commodity in substantial quantities. Examination of the records of Sunset Motor Lines shows that during the period September 27, 1955 through November 23, 1955, the company transported 1,361,910 pounds of carbon black

to Dallas, Texas where the traffic was delivered to other motor carriers for transportation to destination. My company received $7,185.68 in revenue for this service.

Sunset Motor Lines recently received a letter from a large rubber manufacturer, located in the State of Ohio, calling attention to the substantial carbon black rate advantage in favor of rail carriers resulting from the reduced rail rates originally scheduled to become effective on September 24, 1955. The letter further inquires as to what action my company intends to take with respect to adjustment of its carbon black rates to meet rail competition. [fol. 75] Sunset Motor Lines cannot continue to participate in the movement of carbon black traffic except at rates which are substantially competitive, in cents per hundred pounds, with those of the rail carriers. Carbon black traffic is extremely important to my company in view of the fact that the great preponderance of traffic moves in a westerly direction, and the eastbound transportation of carbon black enables it to partially balance its operation. Sunset Motor Lines formerly transported large quantities of Carbon Black to Houston, Texas. This traffic was destined for export from the United States. Since November 24, 1955, virtually all of this traffic has been lost to my company because of the reduced rail rates.

Phil G. Abell.

Subscribed and sworn to before me by Phil G. Abell, to certify which witness my hand and seal of office this 12 day of December, 1955.

Lee Binion, Notary Public, Dallas County, Texas.

My commission expires 6-1-57.

[fol. 76] In United States District Court

Affidavit

State of Texas,
County of Dallas

Before me, the undersigned authority, a Notary Public in and for Dallas County, Texas, on this day personally

appeared Neil G. Yows, who, being by me duly sworn, states on oath as follows:

My name is Neil G. Yows. I reside in Amarillo, Texas. I am President of Amarillo-Borger Express, Inc., a motor common carrier engaged in the interstate transportation of property for hire and a complainant in the proceeding. My company actively solicits the business of transporting the commodity known as "carbon black," and does transport said commodity in substantial volume. Examination of the records of Amarillo-Borger Express, Inc., discloses that during the period January 1, 1955, through September 30, 1955, the company transported 1,204 truck loads of carbon black, totaling approximately 34,916,000 pounds in weight. The total revenue for the transportation of the 1,204 truck loads was $513,961.67, of which $55,601.91 accrued to Amarillo-Borger Express, Inc. This carbon black revenue constituted 18.64 percent of the total gross revenue of my company during the period January 1, 1955, through September 30, 1955.

[fol. 77] I know from my experience in the transportation of carbon black traffic, and my relation with shippers and receivers thereof, that my company cannot continue to participate in the movement of this traffic at rates which are not substantially competitive, in cents per hundred pounds, with those of the rail carriers. The continued transportation of carbon black traffic is essential to the financial stability of Amarillo-Borger Express, Inc.

Neil G. Yows.

Subscribed and sworn to before me by Neil G. Yows, to certify which witness my hand and seal of office this 12th day of December, 1955.

Lee Binion, Notary Public, Dallas County, Texas.

My commission expires June 1, 1957.

[fol. 78] IN UNITED STATES DISTRICT COURT

BEST MOTOR FREIGHT, INC.
2511 Swiss Avenue
Dallas, Texas

AFFIDAVIT

My name is Vernon Crenshaw, General Traffic Manager for Best Motor Freight, Inc., 2511 Swiss Avenue, Dallas, Texas, which operates as a common motor carrier of general commodities in a six state area of Texas, Oklahoma, Missouri, Illinois, Indiana and Ohio by right and authority of Certificate of Public Convenience and Necessity No. MC-103370-Sub. 3.

Among those commodities which constitute a major portion of our Northbound tonnage is listed Carbon Black. My Company actively solicits the business of transporting Carbon Black, and transport this commodity in substantial volume. The continued transportation of the commodity is of extreme importance to the financial well being of Best Motor Freight, Inc. Examination of the records of Best Motor Freight, Inc. show that during the month of October we transported approximately 500,000 pounds of this commodity which produced for us revenue in the amount of $6,651.38. Our experience in the handling of this commodity and our dealings with the Shippers and Receivers thereof indicates conclusively that we cannot participate in the movement of the traffic at rates which are not substantially [fol. 79] competitive with those of the rail carriers in cents per hundred pounds.

Dated at Dallas, Texas this the 12th of December A.D. 1955.

Vernon Crenshaw.

THE STATE OF TEXAS,
County of Dallas

Before me, a Notary Public in and for the County of Dallas, State of Texas, personally appeared Vernon Crenshaw, a person well known to me, who having been duly sworn deposes and says that he prepared the foregoing

affidavit and that the contents thereof are true and correct of his own knowledge.

Given under my hand and seal this the 12th day of December A. D. 1955.

William Bonn, Notary Public, Dallas County, Texas.

My Commission Expires June 1, 1957.

[fol. 80] IN UNITED STATES DISTRICT COURT

AFFIDAVIT

STATE OF TEXAS,
County of Dallas

Before me, the undersigned authority, a Notary Public in and for Dallas County, Texas, on this day personally appeared D. E. Sable, who, being by me duly sworn, states on oath as follows:

My name is D. E. Sable. I reside at Dallas, Texas. I am a Vice-President of Yellow Transit Freight Lines, Inc., a motor common carrier engaged in the interstate transportation of property for hire, and a complainant in this proceeding. My company actively solicits the business of transporting the commodity known as "carbon black", and does transport said commodity in substantial quantities. Examination of the company records shows that during the period January 1, 1955, through September 30, 1955, Yellow Transit Freight Lines, Inc. transported 14,741,226 pounds of carbon black, for which transportation it received $141,740.71 in revenue.

My company has recently received a letter from a large rubber manufacturer, located in the State of Ohio, calling attention to the substantial carbon black rate advantage in favor of the railroads resulting from the reduced rail rates originally scheduled to become effective September 24, 1955, and inquiring as to what action Yellow Transit Freight [fol. 81] Lines, Inc. intends to take with respect to adjustment of its rates to meet the railroad competition. Unless my company maintains carbon black rates which are sub-

stantially competitive in cents per hundred pounds, with those of the rail carriers it cannot participate in the movement of carbon black traffic. Carbon black traffic is extremely important to my company since it constitutes a large portion of the total tonnage originating in the Southwestern territory.

D. E. Sable.

Subscribed and sworn to before me by D. E. Sable, to certify which witness my hand and seal of office this 12th day of December, 1955.

Lee Binion, Notary Public, Dallas County, Texas.

My Commission expires June 1, 1957.

[fol. 82] IN UNITED STATES DISTRICT COURT

AFFIDAVIT

STATE OF TEXAS,
County of Dallas

Before me, the undersigned authority, a Notary Public in and for Dallas County, Texas, on this day personally appeared D. C. Armstrong, who, being by me duly sworn, states on oath as follows:

My name is D. C. Armstrong. I reside at Abilene, Texas. I am Vice-President of Merchants Fast Motor Lines, a motor common carrier engaged in the interstate transportation of property for hire, and a complainant in this proceeding. My company actively solicits the business of transporting the commodity known as "carbon black" and does transport said commodity in substantial quantities. During the period January 1, 1955 through September 30, 1955, Merchants Fast Motor Lines transported 4,407,046 pounds of carbon black to Dallas and Lubbock, Texas, where it was delivered to other motor carriers for transportation to destination. For this service my company received $15,768.88 in revenue.

My company recently received a letter from a large rubber manufacturer domiciled in the state of Ohio calling

attention to the substantial carbon black rate advantage in favor of the railroads resulting from the reduced rail rates originally scheduled to become effective on September 24, [fol. 83] 1955. The letter inquired as to what action Merchants Fast Motor Lines intends to take with respect to adjustment of its carbon black rates to meet rail competition. My company cannot continue to participate in the movement of carbon black traffic except at rates which are substantially competitive, in cents per hundred pounds, with those of the railroads.

D. C. Armstrong.

Subscribed and sworn to before me by D. C. Armstrong to certify which witness my hand and seal of office this 12th day of December, 1955.

Lee Binion, Notary Public, Dallas County, Texas.

My Commission expires June 1, 1957.

[fol. 84] IN UNITED STATES DISTRICT COURT

AFFIDAVIT

STATE OF TEXAS,
County of Dallas

Before me, the undersigned authority, a Notary Public in and for Dallas County, Texas, on this day personally appeared Virgil T. Springer, who, being by me duly sworn, states on oath as follows:

My name is Virgil T. Springer. I reside in Dallas, Texas. I am General Traffic Manager of Strickland Transportation Co., Inc., a motor Common Carrier engaged in the interstate transportation of property for hire and a complainant in this proceeding. My company actively solicits the transportation of carbon black manufactured in the southwest and does transport this commodity. Examination of the records of Strickland Transportation Co., Inc., reveals that during the period January 1, 1955 through September 30, 1955 the company transported 25,201,290 pounds of carbon black.

The net revenue which accrued to Strickland Transportation Co., Inc., was $165,149.08 in transporting this carbon black.

I know from my personal experience in the transportation of carbon black and my relations with shippers and receivers that my company cannot continue to participate in the transportation of this traffic at rates which are not substantially competitive with those of the railroads in cents per one hundred pounds. My company is in receipt of a letter from one of the large tire manufacturers located in Ohio pointing out the rate advantage now enjoyed by rail lines and inquiring as to what action is contemplated regarding this condition.

[fol. 85] Virgil T. Springer.

Subscribed and sworn to before me by Virgil T. Springer, to certify which witness my hand and seal of office this 12th day of December, 1955.

Lee T. Binion, Notary Public, Dallas County, Texas.

My Commission expires June 1, 1957.

[fol. 86] In United States District Court

Amarillo-Borger Express, Inc., et al

vs.

United States of America

Civil Action No. 6289

Opinion of the Court—January 23, 1956

Before Brown, Circuit Judge, Atwell and Estes, District Judges.

Brown, Circuit Judge:

This is another skirmish in the running battle over freight rates for transportation of carbon black from the Southwestern area to the industrial area in the East. The precise question presented is whether the Interstate Com-

merce Commission's action in vacating a prior suspension of proposed rail rates was proper and, preliminary to that, whether such Commission act is reviewable at all.[1] We hold that it is, and that the action was improper.

Carbon black is an important product of natural gas. Consequently, the principal production is in that portion of United States known in the traffic world as the Southwestern area. With extensive natural gas activities, Texas is a leading producer. The principal consumers are the manufacturers of rubber goods, primarily automobile tires, one of the chief and typical consuming points being Akron, Ohio. Transportation of carbon black by Motor Carriers is important to them as it furnishes a substantial tonnage for movement from the Southwest to the Ohio area which would otherwise be a dead haul since the predominant long haul [fol. 87] Motor Carrier traffic moves *to* the Southwest. Until 1954, the rates were apparently competitive between rail and motor carriers.

The controversy, of which the present action is the latest part, originated in 1954. Translating the problem from abstract concepts into a typical illustration of the operation of the rates better demonstrates the significance of the actions taken and its vital importance in the economic existence of complainants. A typical illustration on which there is no dispute is the rate from points in the Texas Panhandle to Akron, Ohio. The pre-1954 rate for motor carrier was $1.53 per cwt; the rail rate was approximately $1.56 cwt. The slight difference, we are told, was in the operation of the blanket general increases.

In the early part of 1954, the rail carriers published certain schedules which established a substantial differential in their favor below motor carrier rates. The rail rate which had been $1.56 was reduced to $1.4785 cwt. The differential was then 5.15 cents below the motor carrier rate ($1.53). These schedules were permitted to become effective.

Thereafter, the motor carriers (which included the com-

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[1] The complaint filed by interested Motor Carriers is for review by statutory three-judge court, 28 U.S.C.A. 1336, 1398, 2284, 2321 to 2325.

plainants here) filed schedules which, they asserted, were designed to meet this new scale and restore the competitive parity which had formerly existed. However, upon the filing of these schedules, the competing rail carriers petitioned the Interstate Commerce Commission to suspend them, and this was done. The Commission ordered an investigation of these proposed motor carrier rates which it had suspended. This hearing was held in July 1954. The Trial Examiner, upon hearing and consideration, filed a report in which he recommended that the Commission find that the motor carriers' reduction in rates was justified and lawful. The rail carriers, as permitted under the practice of the Commission, filed Exceptions to the Report, and the matter is now pending undecided before the Commission. There is no indication before us concerning the reasons for this [fol. 88] delay or the time in which final decision is likely.[2] The seven months' statutory period, 49 U.S.C.A. 15(7), for suspension expired, but in accordance with the administrative practice followed generally, the period of suspension was extended until the matter was finally determined,[3] the

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[2] After decision by the appropriate Division, the rules permit a petition for rehearing and consideration before the full Commission, a procedure which, with further briefs, inevitably involves many months' time; and, upon completion of Commission review, interested parties can precipitate judicial review. If the past is any guide, it is improbable that a final decision would be achieved under a year.

[3] Apparently out of recognition of the physical impossibility of the Commission rendering a decision in these complex matters without adequate hearings, opportunity for preparation of constructive briefs, the submission and argument of interested parties and time for consideration and decision—a process which can seldom be done in seven months—it appears to be the universal practice of all regulated carriers concerned to agree to the continuation of a suspension once issued. On argument here, counsel for both rail and motor carriers assumed that this time-honored practice would be followed if, by our action, the prior suspension order was reinstated. Consequently, the matter goes way beyond April 23, 1956.

the effect of which is to freeze the motor carrier rates at their pre-1954 level ($1.53 cwt).

Notwithstanding the fact that the rail carriers through this situation were enjoying a 5.15 cents differential, they filed tariffs to become effective September 24, 1955, to establish a new schedule of rates substantially below their earlier reduced scale. For the typical movement, the proposed rate was $1.33 compared to the rail's 1954 rate of $1.4785, and the motor carriers' frozen rate of $1.53.

Through their authorized freight bureaus, the motor carriers, including Complainants, filed petitions with the Commission requesting the Commission to suspend the proposed schedules because they were unlawful, would result in rates and charges which would be unjust and unreasonable and [fol. 89] constitute unfair and destructive competition contrary to the National Transportation Policy. Replies were filed by interested parties, including the railroads. In a conference hearing September 21, 1955, the Suspension Board [4] declined to suspend. On September 23, 1955, Division 2, acting as an Appellate Division on suspension matters, issued its order suspending the proposed schedules and directing an investigation. The significant portion of this order [5] states:

> "*And it further appearing*, That upon consideration of the said schedules and protests thereto there is rea-

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[4] A board of Commission employees established for the purpose of handling suspension matters pursuant to 49 U.S.C.A. 17(2), § 7.3, 20 FR 5031-5035, July 14, 1955.

[5] Investigation and suspension docket No. 6476 Carbon Black—Southwest to U.S.A. & Canada

"*It appearing*, That there have been filed with the Interstate Commerce Commission tariff schedules setting forth new reduced rates and charges, and new rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce, to become effective September 24, 1955, and later, designated as follows:"
[Railroad tariffs are described]

[then follows paragraph quoted in text above]

"*It is ordered*, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates,

son to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy; and good cause appearing therefor:"

Petitions for reconsideration by rail carriers and certain shippers were filed, and on November 14, 1955, Division 2 vacated[6] its prior order of suspension.

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charges and regulations contained in such schedules, with a view to making such findings and orders in the premise as the facts and circumstances shall warrant.

"*It is further ordered*, That the operation of the said schedules be and it hereby is suspended, and that the use thereof on interstate and foreign commerce be deferred to and including April 23, 1956, unless otherwise ordered by this Commission."

[6] "*It appearing*, That by an order dated September 23, 1955, the Commission, Division 2, acting as an appellate division, entered upon an investigation concerning the lawfulness of certain rates and charges and the regulations and practices stated in schedules designated therein, and suspended the operation of the said schedules to and including April 23, 1956;

"*It further appearing*, That consideration has been given to petitions of the respondents requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor:

"*It is ordered*, That the said order of September 23, 1955, be, and the same is hereby, vacated and set aside as of November 24, 1955, insofar as it suspended the operation of the schedules designated therein, but that the proceeding of investigation of said schedules shall continue in full force and effect."

[fol. 90] The only "finding" by the Commission [7] was:

> *"It further appearing,* That consideration has been given to petitions of the respondents requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor:"

The result of these administrative proceedings is that motor carriers because of the railroads' successful petitions for suspension are bound by their pre-1954 rates, while the railroads compete for this traffic at drastically reduced rates during the many months ahead when the lawfulness of these rail rates is under review.[8]

[fol. 91] By motion and defense the Commission, the United States, and intervening railroads assert that the matter is beyond the power of review by this court because the granting or denial of a suspension is a matter committed wholly to the Interstate Commerce Commission; that complainants have failed to exhaust their administrative remedies and, in any case, even though the order vacating suspension was illegal,[9] both court and Commission are

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[7] By Order November 23, 1955, the full Commission denied the petition of motor carriers to waive their rule according administrative finality to suspension orders of Division 2, to stay the effectiveness of the order of November 14 and assign the whole matter for argument before the full Commission. The action under review, therefore, is that of the Commission, and not just a Division thereof.

[8] While the order of suspension September 23, 1955, was still effective, the Commission November 1, 1955, set the hearings on the investigation phase November 29, 1955, at Dallas. November 16, two days after the vacation of suspension, the Commission postponed indefinitely the hearings scheduled for November 29. The hearings are now scheduled to commence February 2, 1956.

[9] The suggestion was also made that complainants showed no irreparable injury entitling them to an injunction. Since, as competing carriers, they are clearly an aggrieved party entitled to complain of Commission action, Alton R. Co. v. United States, 315 U.S. 15, 86 L.Ed. 586; Chicago St. P. M.

powerless to suspend the rail schedules which have thus become effective or reinstate the prior rates.

[fol. 92] As the economic consequence of the Commission's action, if wrong, is so adverse we must be certain that the administrative processes which produce this result comply with the spirit and the rules of law.

In this approach, we do not, as the defendants fear we must, substitute ourselves for the Commission or pass judg-

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& O. Ry. Co. v. United States, (D.C.Minn.), 50 Fed.Supp. 249, affd. 322 U.S. 1, 88 L.Ed. 1093; cf. F.C.C. v. Sanders Brothers Radio Station, 309 U.S. 470, 84 L.Ed. 869; Interstate Com. Com. v. Oregon-Wash. R. Co., 288 U.S. 14, 25, 77 L.Ed. 588, 596; American President Lines v. Federal Maritime Board (D.C. D.C.), 112 Fed.Supp. 346, 349, it is our view that if, as we hold, the action is found to be "(1) not in accordance with law * * * (4) without observance of procedure required by law", § 1009(e), Administrative Procedure Act, 5 U.S.C.A. 1001 et seq, it is the duty of the court to set it aside and a complainant who qualifies as a statutory "aggrieved person" need not further show that he will suffer a specific dollar loss for unlawful action of a governmental agency. In any case, by suggestion of the Court on hearing and agreement of counsel, affidavits and counter-affidavits were filed in lieu of oral testimony upon which we find, as a fact, that the movement of carbon black from the Southwestern area to the Eastern part of the United States is an important, vital part of complainants' business, producing substantial revenues which, in all likelihood will be substantially reduced in view of the widespread differentials in favor of railroad transportation. Complainants had already received letters and similar inquiries from shippers and similar trade representatives inquiring what steps were to be taken to meet the rail competition after vacation of the suspension order. The rail's action in successfully obtaining suspension of the motor carriers' 1954 schedules manifests the carrier approach to the dominant significance of the differential in rates as the principal basis for traffic diversion. And, of course, by its order of September 23, the Commission found the probability of destructive competition.

ment, at this time, upon the intrinsic merits of the question of the lawfulness or unlawfulness of the rail tariffs or the ultimate granting or denial of a suspension. Ours is the important, but much narrower inquiry: under the circumstances presented here, was the action of the Commission in vacating the suspension lawful and proper?"[10]

Of course, at the bottom, is the fact that a suspension order was issued on a finding of dominant significance. The order stated in categorical terms that, upon the record then before the Suspension Board and Division 2, on appeal, there was, "reason to believe that they [rates] would, if permitted to become effective, result in rates and charges, [fol. 93] rules, regulations or practices which would be

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[10] The action we review is not the failure of the Commission to suspend, nor are we confronted with the question of reviewability, or extent thereof, of Commission action, taken with proper regard to substantive and procedural requirements, declining to suspend proposed rates, such as that involved in the cases pressed on us so heavily by defendants: Carlson v. United States, (S.D.N.Y.) (three-Judge), 107 Fed.Supp. 398; Algoma Coal & Coke Company et al. v. United States, (D.C.Va., 1935) (three-Judge), 11 Fed.Supp. 487; M. C. Kiser Co. v. Central of Georgia Railway (D.C. Ga.), 236 Fed. 573, affd. 5 Cir., 239 Fed. 718; Manhattan Transit Co., Inc. v. United States, (D.C.Mass.) (three-Judge), 24 Fed.Supp. 174; National Water Carriers Association v. United States, (S.D.N.Y.) (three-Judge), 126 Fed. Supp. 87; Merchants Truckmen's Bureau v. United States (S.D.N.Y.), 16 Fed. Supp. 998. In some, it must be recognized, language so sweeping is used that, if followed literally, would put suspension actions by the Commission beyond the pale, a concept wholly out of harmony with the moving spirit of the Administrative Procedure Act and the underlying force of Judge Hutcheson's opinion, Ferguson-Steere Motor Co. v. United States (N.D.Tex. 1954) (three-Judge), 126 Fed.Supp. 588, 591, that such orders, as other Commission action, are subject to judicial scrutiny to determine legality and whether administrative discretion was exercised at all, and if so, whether abused.

unjust and unreasonable in violation of the * * * act and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy." These are plain, emphatic words of strong meaning. Of course, neither the United States nor the Commission can assert that such virile language must be disregarded as routine, stereotyped bureaucratic formulae for the Commission was under a dual [11] statutory obligation adequately to state its reasons for the suspension order. Since all reviewing courts are admonished, and we are here through

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[11] The first is in § 15(7) of the Interstate Commerce Act, 49 U.S.C.A. 15(7):

"Whenever there shall be filed with the commission any schedule stating a new * * *, fare, or charge, or any new * * *, or any new * * * regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, * * *, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, * * *, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a *statement in writing of its reasons* for such suspension, may from time to time *suspend* the operation of such schedule and defer the use of such rate, fare, * * *, but not for a longer period than seven months beyond the time when it would otherwise go into effect; * * * At any hearing involving a change in a rate, fare, * * *, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, * * * is just and reasonable, * * *." (Emphasis supplied)

The second is in the Administrative Procedure Act, § 8, 49 U.S.C.A. 1007:

"* * * All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, *as well as the reasons or basis thereof*, upon all the material issues of fact, law or discretion presented on the record; * * *." (Emphasis supplied)

specific citation in the briefs before us, to accord to Commission action a presumption of legality, United States v. Chemical Foundation, 272 U.S. 1, 14, 15; Baltimore and Ohio R. Co. v. United States, 298 U.S. 349, 358, 360; Federal Power Commission v. Hope National Gas Co., 320 U.S. [fol. 94] 591, 602, we think that all parties were entitled to take this for its face value as a deliberate, responsible, articulate finding that the proposed rates would produce these results which, contravening the National Transportation Policy, would be destructive of a sound system of national transport, Act September 18, 1940, c. 722, Title I, Section 1, 54 Stat. 899.

But these findings, decisive and significant in nature, made in scrupulous regard for statutory mandate were, by the order of vacation, swept away without the slightest indication of the existence of facts, an adequate description of them, or even the barest statement of reasons underlying the Commission's change of heart. The propriety of its action, on the external record, must be tested under the simple, brief phrase, "and good cause appearing therefor."[12]

If the cryptic phrase "good cause appearing" is a sufficient indication of action, it will be a self-generating bar to any review since, "the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based," S.E.C. v. Chenery Corp., 318 U.S. 80, 87 L.Ed. 626. It is precisely because the scope of judicial review is so narrowly limited, that administrative agencies must, in terms beyond the statutory rubric, reveal the basis for their action by which to judge whether it has met the elemental standards of our system

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[12] The second and significant paragraph of the order read: "It further appearing, that consideration has been given to the petitions of the respondents [railroads and some shippers] requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor;" Obviously the fact that railroads requested vacation of the order would not be good ground; nor, as contended by Complainants, do we think that the Commission meant that.

and statutory requirements. A threshold decision by reviewing court therefore is whether there is a "lack of the [fol. 95] basic or essential findings required to support the Commission's order," State of Florida v. United States, 282 U.S. 194, 215, 75 L.Ed. 291; United States v. Baltimore & Ohio R. Co., 293 U.S. 454, 465, 79 L.Ed. 587; Alabama G.S.R.Co. v. United States, 340 U.S. 216, 224, 95 L.Ed. 225; Cantlay & Tanzola v. United States (S.D. Calif.) (three-Judge), 115 Fed. Supp. 72; North Carolina v. United States, 325 U.S. 507, 89 L.Ed. 1760; Atlanta and St. Andrews Bay Railway Co. v. United States, 104 Fed.Supp. 193; Pacific Island Tariff Bureau v. United States, 129 Fed. Supp. 472.

Moreover, this requirement has now been made explicit by the Administrative Procedure Act, 5 U.S.C.A. 1007(b), which requires a statement of findings and conclusions in their ultimate legal form "as well as the reasons or basis therefor." Conceding, as they must, that under Riss and Co., Inc. v. United States, 341 U.S. 907, 95 L.Ed. 1345, the Commission is subject to the Administrative Procedure Act, the United States and the Commission seek to escape its impact in suspension matters on the theory that, since suspension is a matter committed to the discretion of the Commission, it is specifically excepted under Section 1009:

> "§ 1009. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> "(a) * * * any person * * * adversely affected or aggrieved * * *, shall be entitled to judicial review thereof."

Starting with Board of Railroad Commissioners of North Dakota v. Great Northern Railway Co., 281 U.S. 412, which, describing the statutory background of present Section 15(7) concerning suspensions, states, "This power of suspension was entrusted to the Commission only", and relying heavily on *Carlsen, Algoma Coal, Kiser, Manhattan Transit Co.*, and others cited footnote 10, supra, holding that a refusal to suspend is not subject to review, defendants argue that this administrative judgment exempts the whole field from the requirements of the Administrative Procedure Act.

[fol. 96] A proper regard for the whole reach of the Administrative Procedure Act and its long legislative history will not support an argument which would automatically remove from its protection substantially every administrative agency to whom was entrusted judgment and discretion in its administrative decision. This language was used to assure that judicial review would not be contrived where it was plain that none was intended, and where the action under inquiry was one wholly within the right of the agency to grant or refuse, allow or deny, with no statutory or similar standard established upon which to base its action. But the exercise of discretion, the making of judgments, and the issuance of sanctions, 5 U.S.C.A. 1001(f), upon the basis of administrative expertise are precisely the matters which Congress in this important legislation intended should be under, not exempt from, the Administrative Procedure Act.[13]

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[13] The following references to legislative history are found (on pages indicated) in Senate Document No. 258, 79th Congress, Second Session, Administrative Procedure Act, Legislative History:

Report of the Committee on the Judiciary (Report No. 752) at page 212:

"Sec. 10 [now § 1009] Judicial Review—*Section 10 on judicial review does not apply in any situation so far as there are involved matters with respect to which statutes preclude judicial review or agency action is by law committed to agency discretion.*

"Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.

"The basic exception of matters committed to agency discretion would apply even if not stated at the outset. If, for example, statutes are drawn in such broad terms that in a given case there is no law to apply, courts of course have

Consequently, we are of the clear opinion that whatever the ultimate scope of judicial review might be on a suspension matter, the Commission is obliged in all stages to respect the requirements, the letter and the spirit of the Administrative Procedure Act. Since both it and the general law concerning the sufficiency of Commission action require an adequate statement of the underlying reasons for the action, we think it evident that the order of vacation did not satisfy these requirements. This order vacating the prior one is a part of, and must be read with, it. All that it says is that "good cause appearing" the prior action is rescinded. If it is read as though it were meant to be a

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no statutory question to review. That situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administra-[fol. 97] tive powers. However, "wherever statutory standards, definitions, or other grants of power deny or require action in given situations or confine an agency within limits as required by the Constitution, then the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record."

Committee on the Judiciary, House of Representatives, (House Report No. 1980), page 275, 276:

"Section 10. * * * [heading same as Senate Committee Report]

"This section requires adequate, fair, effective, complete, and just determination of the rights of any person in properly invoked proceedings.

"* * * [Here follows first paragraph of Senate Committee Report quoted above] The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.

"Matters of discretion are necessarily exempted from the section, since otherwise courts would in effect supersede agency functioning. But that does not mean that questions

repeal, a withdrawal, and rescission of the findings that the rates would (1) be unjust, (2) unreasonable, (3) in violation [fol. 99] of the Act, (4) constitute unfair destructive competition, and (5) contravene the National Transportation Policy, the record would yet be inadequate. We do not think the Commission can make serious findings of this nature and then, without more, announce that they no longer exist. The basic facts, the underlying reasons for that action, would require, as a minimum, some discussion of the factors leading the Commission intelligently and as a matter of deliberative judgment in good faith to contrary conclusions. If, as may be suggested by the order of November 14, the Commission felt that there was information contained

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of law properly presented are withdrawn from reviewing courts. Where laws are so broadly drawn that agencies have large discretion, the situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administrative powers. However, where statutory standards, definitions, or other grants of power deny or require action in given situations or confine an agency within limits as required by the Constitution, then the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record. In any case the existence of discretion does not prevent a person from bringing a review action but merely prevents him *pro tanto* from prevailing therein."

And in debates in the Senate (Congressional Record March 12, May 24, 25, 27, 1946) during presentation by its distinguished sponsor Senator McCarran, page 310, 311:

"Mr. McCarran: I yield.

"Mr. Donnell: I should like to ask the distinguished senator a question. Section 10 [now 5 U.S.C.A. 1009] of the bill recites in part that—

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

[fol. 98] "(a) Right of review: Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of

in the petitions to vacate which justified or required the change in its conclusions, the Commission could easily have given sufficient elaboration of the file record to enable parties, counsel, and reviewing tribunals to determine whether this was the act of genuine judgment, deliberate discretion and reasonable decision, or whether it was hasty, ill considered, precipitous action with no substantial basis for it.

What we have said is certainly correct if it is assumed that the Commission intended its cryptic phrase "good cause appearing" to wipe away all of its prior fact conclusions. It is all the more so if, as seems likely, the Commission intended that the balance of its order of September 23

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any relevant statute, shall be entitled to judicial review thereof.

"It has occurred to me the contention might be made by someone in undertaking to analyze this measure that in any case in which discretion is committed to an agency, there can be no judicial review of action taken by the agency. The point to which I request the Senator to direct his attention is this: In a case in which a person interested asserts that, although the agency does have a discretion vested in it by law, nevertheless there has been abuse of that discretion, is there any intention on the part of the framers of this bill to preclude a person who claims abuse of discretion from the right to have judicial review of the action so taken by the agency?

"Mr. McCarran: Mr. President, let me say, in answer to the able Senator that the thought uppermost in presenting this bill is that where an agency without authority or by caprice makes a decision, then it is subject to review.

* * * * * * *

"Mr. Donnell: But the mere fact that a statute may vest discretion in an agency is not intended, by this bill, to preclude a party in interest from having a review in the event he claims there has been an abuse of that discretion. Is that correct?

"Mr. McCarran: It must not be an arbitrary discretion. It must be a judicial discretion; it must be a discretion based on sound reasoning."

calling for investigation of the rates to determine their lawfulness should remain in effect. In expressed terms the only change made by the subsequent order was to vacate the former so far as concerned suspension alone. It literally left in force the findings of unlawfulness, destructive competition, and then, without more than the magic phrase "good cause appearing", determined that what on September 23 led them to suspend now led them to unsuspend. The Commission may, as any other body, have the right to change its mind, but its action must demonstrate the "reasons or basis therefor."

[fol. 100] We are equally of the clear opinion that Complainants have the right to challenge and the court has the power to nullify action so illegal and having such immediate and irreparable consequences. Unless the rates are suspended, the Complainants have no protection against this competition until such time as the Commission's decision has become final on the basic investigation or on a complaint under Section 13, 49 U.S.C.A. 13. But under the statutory scheme of Section 15(7), rates can be suspended only within thirty days and then not for a time beyond seven months. If, as we hold it was, the act of the Commission in vacating the prior suspension was illegal, the only possible way for Complainants to secure the benefit of that suspension or to eradicate the devastating consequences of an unlawful vacation of it, was by an immediate appeal and injunction. In this sense it was no routine, administrative interim action but was truly final in form and effect; once gone, it was irretrievable. There was thus no further administrative machinery or procedure available—much less to be exhausted. Utah Fuel Company v. National Bituminous Coal Commission, 306 U.S. 56; Isbrandtsen Co. v. United States, 211 F.2d 51; see also opinion of Mr. Justice Douglas, as Circuit Justice, standard v. Olsen, May 22, 1954, 98 L.Ed. 1151. If the Commission act is allowed to stand, the right to a suspension is forever gone until, months or years later, a decision of the Commission on basic unlawfulness or unreasonableness of the rates becomes final and effective. Complainants may succeed in the investigation proceeding soon to commence, but grinding, as it must, slowly through inevitable judicial review, the motor carriers

will have no relief for the traffic which they have lost, diverted to rails, during this long period of time.[14] We do not mean to say that Complainants are entitled to a suspension; but when one has validly issued it can be rescinded only by lawful methods.

[fol. 101] Nor can this situation which makes judicial relief from administrative error imperative be turned, as defendants attempt, into the argument that such relief should be denied because the Commission is now powerless to suspend rates once they are in effect. We can assume that by virtue of Sections 6(3), 15(1) and 15(7) of the Act, 49 U.S.C.A. 6(3), 15(1), 15(7), that suspension must be ordered within thirty days of the initial filing, and where once allowed to become effective from the absence of a suspension order, the Commission cannot thereafter suspend. Skinner and Eddy Corp. v. United States, 249 U.S. 557. But no such thing occurred here. Here, before the rates became effective, a valid suspension order was issued. On the record this suspension order was vacated, but, for the reasons we have detailed, this action was contrary to law. The power of the Commission to continue a suspension validly made (until validly set aside) cannot be altered by illegal action, nor can the carrier (here the rails) upon whose petition the illegal action was taken, assert that their rights to put into effect tariff rates shall be the same as though no such administrative action had taken place. Once the order of November 14 is expunged, the matter is remitted to the situation existing immediately prior to its entry: The rates were then under valid suspension. The power of the Commission does not exhaust itself through its own errors. If it were so, the law would indeed be a straight jacket.

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[14] The provision in § 15(7), footnote 11 supra, for protection of shippers after the expiration of the seven months' statutory period of suspension is of no help to competing carriers adversely affected since this relates only to "proposed *increased*" rates, and the requirement to keep accurate records and make refunds of excess payments received in the interim is limited to "the persons in whose behalf such amounts were paid."

It follows, therefore, that the order of November 14, 1955, vacating the suspension must be declared void, an injunction against its enforcement issued, and the proceedings [fol. 102] remanded to the Commission for further and not inconsistent proceedings as though the order had never been made. To effectuate the holding herein, the injunction will forbid the use or application of tariff [15] rates and schedules which became, or were allowed to become, effective by reason of the vacation of the prior suspension order of September 23, 1955, until such time as the order of September 23, 1955, shall have been rescinded or modified by lawful action of the Commission.

Judgment for plaintiff.

Remanded to the Commission.

JOHN R. BROWN,
Circuit Judge
WM. H. ATWELL,
District Judge
JOE E. ESTES,
District Judge

[fol. 103] IN UNITED STATES DISTRICT COURT

AMARILLO-BORGER EXPRESS, INC., ET AL

vs.

UNITED STATES OF AMERICA

Civil Action No. 6289

JUDGMENT—January 24, 1956

Be it remembered, that on December 12, 1955, in the above entitled and numbered cause wherein Amarillo-Bor-

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[15] Subsequent to November 14, 1955, the railroads filed Supplement 170, published as a new tariff schedule, effective December 31, 1955, but which is, they state, the equivalent of, and restores, the schedules suspended September 23.

ger Express, Inc.; Best Motor Freight; Knaus Truck Line, Inc.; Leeway Motor Freight, Inc.; Merchant's Fast Motor Lines, Inc.; Strickland Transportation Company, Inc.; Sunset Motor Lines, Inc.; and Yellow Transit Freight Lines, Inc., are Complainants; the United States of America is Defendant; and the Interstate Commerce Commission is intervenor on behalf of the Defendant; and the Southwestern Railroads (a group of Railroads whose names are listed in Appendix "A" of this judgment) are likewise intervenors on behalf of the Defendant, the trial upon its merits came on regularly to be heard before a Court of three judges convened pursuant to law. All parties appeared by counsel and the merits of the cause were fully presented, and the matter was submitted to the Court.

Thereafter, and on January 23, 1956, the Court delivered and filed its unanimous opinion to the effect that the assailed order is void and that the Complainants are entitled to injunctive relief as specified in the said opinion, to which opinion reference is here made.

It is, therefore, ordered, adjudged and decreed by [fol. 104] the Court that the order of the Interstate Commerce Commission entered on November 14, 1955, and reading as follows:

> "Order. At a Session of the Interstate Commerce Commission, Division 2, acting as an appellate division, held at its office in Washington, D. C., on the 14th day of November, A. D. 1955. Investigation and Suspension Docket No. 6476. Carbon Black—Southwest to U.S.A. & Canada. *It appearing,* That by an order dated September 23, 1955, the Commission, Division 2, acting as an appellate division, entered upon an investigation concerning the lawfulness of certain rates and charges and the regulations and practices stated in schedules designated therein, and suspended the operation of the said schedules to and including April 23, 1956; *It further appearing,* That consideration has been given to petitions of the respondents requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor; *It is ordered,* That the said order of September 23, 1955, be, and the same is hereby,

vacated and set aside as of November 24, 1955, insofar as it suspended the operation of the schedules designated therein, but that the proceeding of investigation of said schedules shall continue in full force and effect. By the Commission, Division 2, acting as an appellate division. Harold D. McCoy, Secretary. SEAL."

be, and the same is hereby, declared to be void, ab initio, said order is hereby set aside and its enforcement is hereby restrained and enjoined.

It is further ordered, adjudged and decreed by the Court that the suspension proceedings out of which the enjoined order arose be, and the same are hereby, remanded to the Interstate Commerce Commission for further and not inconsistent proceedings as though the order of November 14, 1955, had never been entered.

It is further ordered, adjudged and decreed by the Court that the use in interstate or foreign commerce of Supplement 170 to Southwestern Lines Freight Tariff No. 111-J, ICC No. 3744 (Agent F. C. Kratzmeir) and any and all other Railroad tariff rates and schedules which became or were allowed to become effective by reason of the order of November 14, 1955 (to the extent that they publish rates suspended by the order of Sept. 23, 1955), be and the same is hereby prohibited until such time as the order of September 23, 1955, issued by the Interstate Commerce Commission in its investigation and suspension Docket No. 6476 shall have been rescinded or modified by lawful action of the Interstate Commerce Commission.

[fol. 105] Rendered and entered in open Court this 24th day of January, 1956.

Wm. H. Atwell, United States District Judge

Approved for entry: Ralph W. Currie, Attorney for Complainants; John C. Ford, Attorney for United States of America; Bernard English, Attorney for Interstate Commerce Commission; Wm. R. McDowell, Attorney for Southwestern Railroads.

[fols. 106-107] Appendix A to Opinion (copy)

Omitted. Printed side page 30 ante.

[fol. 108] IN UNITED STATES DISTRICT COURT

MOTION FOR NEW TRIAL BY SOUTHWESTERN RAILROADS

Come now, the Southwestern Railroads, Party-Defendants named in Appendix "A" attached to their answer filed herein, and file this their Motion, pursuant to Rules 52B and 59A, 28 U.S.C. Federal Rules, to open the Judgment herein and to grant a rehearing on the following grounds:

1.

The Court's opinion permits a review of a temporary rate suspension order made by the Interstate Commerce Commission. Southwestern Railroads respectfully contend that in doing so the Court has failed to give effect to Section 10 of the Administrative Procedure Act (5 U.S.C., Section 1009), which denies review of agency action when such action is committed to agency discretion. Clearly the intent of Section 15, Subsection (7) of the Interstate Commerce Act is to allow the agency a six months' discretionary period in which the agency can decide the reasonableness of a rate and during which the agency can provide for either the applicability or non-applicability of the new rate. This statute gives the agency, the expert body in this field, an opportunity to have a hearing and to apply its special knowledge in the field, but the Court, in allowing such a premature review of agency action, denies the agency the [fol. 109] statutory-given discretion. The Southwestern Railroads contend that the Court should review its findings in this respect and allow further hearing on this point.

2.

Because of the Court's Judgment in this matter, the Southwestern Railroads are now forced to charge a higher rate than that provided for in the tariff here under attack, and in view of the Court's finding that the Commission's Order of November 14, 1955 is void ab initio, the carriers are placed in the position of being forced to collect from the shippers or receivers undercharges represented by the dif-

ferences between the lower rates charged under the new tariff and the higher rates which would have been applicable had the tariff not been filed. The question of the correctness of intervening charges was not argued nor placed in issue before the Court and is a matter about which the shippers, receivers, and the Southwestern Railroads are greatly concerned because of the financial impact it will have upon them and because of the great amount of clerical work which will be forced upon them in computing the correct charges due from shippers and receivers and the sales prices based thereon. Because of the importance of this phase of the Court's Judgment, the Southwestern Railroads respectfully request that rehearing be granted on the correctness of this phase of the case.

3.

The Court's decision is based upon the premise that the Order of the Commission dated November 14, 1955 was improperly issued because of the failure to include in such order those findings and conclusions provided for in 5 U.S.C., Section 1007. Southwestern Railroads respectfully contend that such a premise is erroneous in that such findings and conclusions are only required in reviewable orders [fol. 110] of final effect and should not be made applicable to matters of temporary effect entrusted solely to the agency's discretion as in the instance of temporary suspensions made under 49 U.S.C. Section 15 (7).

Southwestern Railroads respectfully request that should this Motion be granted, that the Court's Judgment of January 24, 1956 be stayed pending rehearing; and it is also requested that the carrier-defendants have an additional fifteen days for the filing of brief amplifying the grounds for new trial set forth above.

Wherefore, premises considered Southwestern Railroads respectfully pray that the Judgment entered herein on January 24, 1956 be opened and that a rehearing thereof be granted, that the Court's Judgment be stayed pending rehearing, and for such other and further relief to which the

Southwestern Railroads may be entitled either in law or in equity.

William R. McDowell, Attorney for Southwestern Railroads, Texas and Pacific Building, 1025 Elm Street, Dallas, Texas.

Certification of Service (omitted in printing)

[fol. 111] In United States District Court

Motion for New Trial by the United States of America and the I.C.C.

Now comes the United States of America and the Interstate Commerce Commission, defendants in the above styled action, and moves the Court pursuant to Rule 52(b) and Rule 69(a), 28 U.S.C., Federal Rules of Civil Procedure, to open the judgment herein and to grant re-hearing on the following grounds:

1.

The Court's opinion rests on the premise that Section 8(b) of the Administrative Procedure Act requires the Commission to make findings when it vacated its order of September 23, 1955. Section 8(b), on its face, has no application here. The section, as the Supreme Court has recently recognized, applies only "In cases in which a hearing is required to be conducted in conformity with Section 7—." [fol. 112] See American Trucking Association v. United States, 344 U.S. 298, 319-320. No hearing whatsoever is required in suspension proceedings—let alone the type of hearing that must be conducted in conformity with Section 7. On this ground alone, reconsideration is warranted.

2.

A substantial question is also presented by the Court's apparent holding that Commission orders granting or denying suspension are made reviewable by Section 10 of the

Administrative Procedure Act. This section, by its own terms, does not apply where "agency action is by law committed to agency discretion—." The importance of this question in the administration of the Interstate Commerce Act can be gauged by the fact that over four thousand requests for suspension relief were acted upon during the year ending November 1, 1955. 69th Annual Report, Pages 101-102. If the Court's decision is correct, the disposition of each of these requests would be subject to review. The far reaching and novel nature of the decision presents an additional reason for granting re-argument. This is particularly so in view of the fact that it has been accepted universally since 1910 that rates which have become effective are not subject to suspension by the Commission or by the courts.

3.

The Court's judgment, entered January 24, 1956, sets aside the Commission's order of November 14, 1955, as "*void ab initio.*" The result of this judgment is that for [fol. 113] over nine weeks the intervening railroads have been collecting freight charges below the legal rate and that these railroads are now obligated to collect from its shippers for undercharges—that is, the difference between the charges actually paid and the higher rate previously enforced. Since the effect of the Court's decision on these shippers was not briefed or argued and was not considered in the Court's opinion, this matter should likewise be examined on re-argument.

4.

Each of the above questions was either completely ignored or, at best, received scant mention in the original memoranda filed in this action. One reason for this, it is felt, is the inadequate time—approximately two weeks—available to counsel between the filing of the action and the final hearing ordered by the Court. As a consequence, only a few days were available for the actual task of briefing, and there was no opportunity to see the plaintiffs' brief prior to submitting the defendants' briefs. Only through re-argument can these important questions receive the serious consideration they merit.

Should the Court grant this motion, it is also requested that the Court's judgment of January 24, 1956, be stayed pending decision on the re-argument.

In view of the limited time defendants have had to prepare this motion, it is requested that an additional fifteen [fol. 114] days be allowed for the filing of briefs amplifying the grounds for new trial set forth above.

(s) Stanley N. Barnes, Assistant Attorney General; (s) Heard L. Floore, United States Attorney; (s) John C. Ford, Assistant United States Attorney; (s) James E. Kilday, (s) Albert Parker, (s) Earl E. Parker, Attorneys, Department of Justice, Washington 25, D. C., Attorneys for the United States of America.

(s) Robert W. Ginnane, General Counsel, Interstate Commerce Commission; (s) Bernard H. English, Attorney, Interstate Commerce Commission, Fort Worth, Texas; (s) H. Neil Carson, Attorney, Interstate Commerce Commission, Washington 25, D. C., Attorneys for Interstate Commerce Commission.

[fol. 115] Certificate of Service (omitted in printing)

[fol. 116] In United States District Court

Order Overruling Motions for New Trial—February 21, 1956

On this the 20th day of February, 1956, came on for consideration by Court of three judges, to-wit, John R. Brown, Circuit Judge, William H. Atwell and Joe E. Estes, District Judges, the motions of the defendant and intervenors on behalf of the defendant for new trial.

Consideration having been given to said motions and to the arguments and the briefs for and against the same, and it appearing to the Court that said motions are without merit;

It is, therefore, ordered that the motions for new trial be and they are hereby severally overruled.

Rendered and entered in open court this 21st day of February, 1956.

John R. Brown, United States Circuit Judge, Wm. H. Atwell, United States District Judge, Joe E. Estes, United States District Judge.

Approved as to Form: Ralph W. Currie, Attorney for Complainants; John C. Ford, Attorney for United States of America; Bernard English, Attorney for Interstate Commerce Commission; Wm. R. McDowell, Attorney for Southwestern Railroads.

[fol. 116a] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL BY SOUTHWESTERN RAILROADS TO THE SUPREME COURT OF THE UNITED STATES—
Filed March 15, 1956

I. Notice is hereby given that the Southwestern Railroads, as listed in Appendix A hereto attached, Defendants herein, hereby appeal to the Supreme Court of the United States from the final decree and judgment, entered in this action on January 24, 1956.

This appeal is taken pursuant to 28 U.S.C., Sections 1253 and 2101 (b).

II. The Clerk will please prepare a transcript of the record in this Cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Original Complaint.
2. Motion to Dismiss Filed by United States of America.
3. Motion for Leave to Intervene of Southwestern Railroads.
4. Order Granting Southwestern Railroads Leave to Intervene.
5. Motion to Dismiss and Answer Filed by Southwestern Railroads.

6. Motion for Leave to Intervene of Interstate Commerce Commission.

7. Order Granting Interstate Commerce Commission Leave to Intervene.

8. Motion to Dismiss Filed by Interstate Commerce Commission.

9. Affidavits of Lee Cisneros, Harry L. Brand, J. D. Spruill, R. J. Barlow, W. C. T. Utley, Arthur B. Strunk, Dean McCoy, Phil G. Abell, Neil C. Yows, Vernon Crenshaw, D. E. Sable, D. C. Armstrong, and Virgil T. Springer.

10. Opinion of District Court.

11. Judgment of District Court.

[fols. 116b-116c] 12. Notice of appeal to the Supreme Court of the United States.

III. The following questions are presented by this appeal:

1. Is an Interstate Commerce Commission's order, issued pending a hearing and final decision on the lawfulness of rates, vacating a previously ordered suspension of such rates, subject to judicial review under the provisions of Section 10 of the Administrative Procedure Act (5 U.S.C., 1009)?

2. Is the Interstate Commerce Commission required to make findings to support an order, issued pending a hearing and final decision on the lawfulness of rates, vacating a previously ordered suspension of such rates?

3. Is the Interstate Commerce Commission required to make findings pursuant to Section 8(b) of the Administrative Procedure Act to support an order, issued pending a hearing and final decision on the lawfulness of rates, vacating a previously ordered suspension of rates?

4. Is the Court empowered to set aside interstate rates already in effect, prior to a final Interstate Commerce Commission decision on their lawfulness?

5. Is the Court empowered to reestablish interstate rates which have been lawfully canceled?

J. T. Suggs, Counsel for Southwestern Railroads, Defendants-Appellants, 914 Texas and Pacific Building, Dallas 2, Texas.

Of Counsel: William R. McDowell

PROOF OF SERVICE (omitted in printing)

[fol. 116d] APPENDIX A TO NOTICE (COPY) Omitted. Printed side page 30 ante.

[fol. 117] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL BY THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION TO THE SUPREME COURT OF THE UNITED STATES—
Filed April 19, 1956

I.

Notice is hereby given that the United States of America and the Interstate Commerce Commission, defendants in the above-entitled civil action, hereby appeal to the Supreme Court of the United States from the final decree and judgment entered on January 24, 1956, and from the order entered on February 21, 1956, overruling a motion for a new trial.

This appeal is taken pursuant to 28 U.S.C. 1253 and 2101(b).

II.

The Clerk is requested that there be included in the transcript of record for transmission to the Clerk of the Supreme Court, in addition to the matters listed by the Southwestern Railroads and the plaintiffs Amarillo-Borger Express, Inc., et al., the motion for new trial filed by the United States of America and the Interstate Commerce Commission and the motion to dismiss filed by the United States of America.

[fol. 118] III.

The following questions are presented by this appeal:

1. Is an Interstate Commerce Commission order, issued pending a hearing and final decision on the lawfulness of proposed rate schedules and vacating a previously ordered suspension of such schedules, subject to judicial review?

2. Is the Interstate Commerce Commission required to make findings to support such an order?

3. Whether the District Court erred in setting aside interstate rates already in effect prior to a final Interstate Commerce Commission decision on their lawfulness?

4. Whether the District Court erred in establishing interstate rate schedules which would have expired by their own terms?

Robert W. Ginnane, General Counsel; H. Neil Garson, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C., Attorneys for Interstate Commerce Commission; Earl E. Pollock, Attorney, Department of Justice, Washington 25, D. C., Attorney for United States of America.

[fols. 119-121] Certificate of Service (omitted in printing)

[fol. 122] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 123] SUPREME COURT OF THE UNITED STATES—
October Term, 1956

No. 125 and 224

ARKANSAS & LOUISIANA MISSOURI RAILWAY COMPANY; THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY; GULF, COLORADO AND SANTA FE RAILWAY COMPANY; ET AL.,
Appellants,

vs.

AMARILLO-BORGER EXPRESS, INC., ET AL.; AND UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellants,

vs.

AMARILLO-BORGER EXPRESS, INC., ET AL.

ORDER NOTING PROBABLE JURISDICTION—October 8, 1956

Appeals from the United States District Court for the Northern District of Texas.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of two hours allowed for oral argument.

54/2

Supreme Court, U. S.
FILED
MAY 31 1956
HAROLD B. WILLEY, Clerk

No. 889 125

In the

Supreme Court of the United States

Civil No. 6289

In the United States District Court for the Northern Division of Texas, Dallas Division

AMARILLO-BORGER EXPRESS, INC., *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

STATEMENT AS TO JURISDICTION

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SUBJECT INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	3
Statement of the Case	4
The Questions are Substantial	6
Appendix A (List of Southwestern Railroads)	21
Appendix B (District Court's Opinion and Judgment)	23
Appendix C (Statutes Involved)	47

Page

Air Line Pilots Ass'n Internat'l v. Civil Aeronautics Bd., 215 Fed. 2d 122 14

Algoma Coal & Coke Co. v. United States, 11 F. Supp. 487, 495 7

American Trucking Ass'ns v. United States, 344 U. S. 298, pp. 319-320 13

Atchison, Topeka & Santa Fe Ry. Co. v. United States, 130 F. Supp. 76, 78 8

Atchison, Topeka & Santa Fe Ry. Co. v. United States, 232 U. S. 199, 221 11

Board of Commissioners v. Great Northern R. Co., 281 U. S. 412, 529 7

Carlson v. United States, 107 F. Supp. 398 (S. D. N. Y., 1952) 7

Cook-Clelana Catalina Airways v. Civil Aeronautics Bd., 195 F. 2d 206, 207 15

Eastern Air Lines v. Civil Aeronautics Bd., 185 Fed. 2d 426, 427-428 15

Ewing v. Mytinger & Casselberry, 339 U. S. 594, 598 9

F. C. C. v. Pottsville Broadcasting Co., 309 U. S. 134, 144 11-12

George A. Rheman Company v. United States, 133 F. Supp. 668, 673 15

Kenny v. United States, 103 F. Supp. 971 15

Loomis v. Lehigh Valley R. Co., 240 U. S. 43 11

Louisville & N. R. Co. v. Garrett, 231 U. S. 298 11

M. C. Kiser & Co. v. Central of Georgia Ry. Co., 236 Fed. 573, 577 (S. D. Ga., 1916), affm. 239 Fed. 718 ..... 7, 9

Page

Manhattan Transit Co. v. United States, 24 F. Supp. 174, 177 (D. Mass., 1938) 7

Merchant Truckmen's Bureau v. United States, 16 F. Supp. 998, 1000 (S. D. N. Y., 1936) 7

National Water Carriers Ass'n v. United States, 126 F. Supp. 87, 90-91 (S. D. N. Y., 1954) 7

Olin Industries, Inc. v. National Labor Relations Board, 72 F. Supp. 225 8

Peik v. Chicago, N. W. R. Co., 94 U. S. 164 11

Radio Corp. v. United States, 341 U. S. 412 3

Reagan v. Farmers' Loan & T. Co., 154 U. S. 362 11

Simpson v. Shepard, 230 U. S. 352 11

Skinner & Eddy Corp. v. United States, 249 U. S. 557, 565 9

Terminal R. Asso. v. United States, 266 U. S. 17 11

United States v. Capital Transit Company, 325 U. S. 357 3

United States v. Detroit and Cleveland Navigation Company, 326 U. S. 236 3

United States v. Pierce Auto Freight Lines, 327 U. S. 515 3

Statutes Cited

Administrative Procedure Act:

Secs. 8 and 10 (5 U. S. C. A. 1007, 1009) 3-8

Secs. 2, 2(c) (5 U. S. C. A. 1001) 12

Sec. 4 (5 U. S. C. A. 1003) 12

Page

Interstate Commerce Act:

49 U. S. C. 15(7) 3-6, 15

49 U. S. C. 15(1) 16

49 U. S. C., Sec. 41 18

Judicial Code:

United States Code, Title 28, Secs. 1332, 1398, 2284, 2321-2325 2

United States Code, Title 28, Secs. 1253 and 2101(b) 2

Administrative Reports

69th Annual Report of the Commission, pages 101, 102 ..... 9, 10, 17

Legislative Reports

Senate Committee Report of 1945 11

Senate Document No. 248, 79th Cong., 2d Sess., pages 19 and 20 13

In the

Supreme Court of the United States

Civil No. 6289

In the United States District Court for the Northern Division of Texas, Dallas Division

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AMARILLO-BORGER EXPRESS, INC., *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

STATEMENT AS TO JURISDICTION

In compliance with paragraph 2 of Rule 13 of the Rules of the Supreme Court of the United States, the Southwestern Railroads, as shown in Appendix A hereto annexed, defendants-appellants, submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this cause.

OPINION BELOW

The opinion of the District Court for the Northern District of Texas, Dallas Division, is reported in 138 F. Supp. 411. A copy of the opinion and the judgment are attached hereto as Appendix B.

JURISDICTION

Eight motor carriers[1] brought this action in a three-judge district court under Title 28, United States Code, Sections 1332, 1398, 2284, and 2321-2325, to enjoin and set aside an interlocutory order of the Interstate Commerce Commission vacating a previous interlocutory order of the Commission suspending, under Section 15(7) of the Interstate Commerce Act,[2] the operation of certain rail rates on carbon black from the Southwest to destinations in the United States and Canada.

The judgment of the district court was rendered and entered on January 24, 1956. Defendants' motions for new trial were severally overruled by order of the court on February 21, 1956. Notice of appeal was filed with the district court on March 14, 1956. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct

[1] Amarillo-Borger Express, Inc., Best Motor Freight, Knaus Truck Lines, Inc., Leeway Motor Freight, Inc., Merchant's Fast Motor Lines, Inc., Strickland Transportation Company, Inc., Sunset Motor Lines, Inc., Yellow Transit Freight Lines, Inc., Plaintiffs.

[2] Appendix C.

appeal in this case: *United States v. Capital Transit Company, 325 U. S. 357; United States v. Detroit and Cleveland Navigation Company, 326 U. S. 236; United States v. Pierce Auto Freight Lines, 327 U. S. 515; Radio Corp. of America v. United States, 341 U. S. 412.*

QUESTIONS PRESENTED

1. Is an Interstate Commerce Commission's order issued pending a hearing and final decision on the lawfulness of rates, vacating a previously ordered suspension of such rates, subject to judicial review?

2. Is the Interstate Commerce Commission required to make findings to support an order, issued pending a hearing and final decision on the lawfulness of rates, vacating a previously ordered suspension of such rates?

3. Can a district court set aside interstate rates already in effect prior to a final Interstate Commerce Commission decision on their lawfulness?

4. Can a district court reestablish interstate rates which have been lawfully canceled?

STATUTES INVOLVED

Section 15(7) of the Interstate Commerce Act, as amended [49 U. S. C. 15(7)], and Sections 8 and 10 of the Administrative Procedure Act (5 U. S. C. 1007 and 1009) are set forth in Appendix C hereto.

STATEMENT OF THE CASE

This is an action brought to set aside an order of the Interstate Commerce Commission, Division 2, acting as an appellate division, entered November 14, 1955, in the proceeding entitled *Carbon Black—Southwest to U. S. A. and Canada, Investigation and Suspension Docket No. 6476.*

The proceeding before the Commission was instituted by the filing of proposed schedules of reduced rates and charges on carbon black by southwestern and western trunk line rail carriers to become effective September 24, 1955. Protests and petitions for suspension of the proposed rates were filed by five motor carrier rate bureaus, and replies thereto were filed by the rail carriers involved. On September 22, 1955, the Suspension Board of the Commission denied the petitions for suspension but voted to investigate the lawfulness of the proposed rates.

On the following day, September 23, 1955, Division 2, acting as an appellate division, entered an order suspending the operation of the proposed rates and directing a full investigation into the lawfulness of the schedules. Thereafter, petitions for reconsideration were filed by the National Gas Products Association and the rail carriers, and replies thereto were filed by the protesting motor carrier rate bureaus. On November 14, 1955, Division 2 entered an order stating in pertinent part "That the said order of September 23, 1955, be, and the same is hereby, vacated and set aside as of November 24, 1955, insofar as it suspended the operation of the schedules designated therein, but that

the proceeding of investigation of said schedules shall continue in full force and effect." A stay of this order was denied by the full Commission on November 23, 1955.

On the same day, November 23, 1955, eight motor carriers brought this action in the United States District Court for the Northern District of Texas, Dallas Division, under Title 28, United States Code, sections 1332, 1398, 2284, and 2321-2325, to review the November 14, 1955, order of the Commission. A request for a temporary restraining order was denied. Trial was on the merits and the district court, on January 23, 1956, rendered its opinion setting aside the order of the Commission entered on November 14, 1955, and remanded the cause to the Commission for further proceedings not inconsistent with its decision. The Court held that the Commission's order of November 14, 1955, was subject to judicial review under the provisions of Section 10 of the Administrative Procedure Act. The Court ruled that the Commission was required to make findings to support its order of November 14, 1955, and that, since the Commission had not done so, the order of November 14, 1955, was illegal and void. On January 24, 1956, the Court entered its judgment voiding *ab initio* the November 14, 1955, order of the Commission and enjoining the southwestern rail carriers from using the assailed tariffs which had become effective November 24, 1955. Motions for new trial were overruled by order of the Court on February 21, 1956.

THE QUESTIONS ARE SUBSTANTIAL

The decision of the District Court strikes down administrative procedure of the Interstate Commerce Commission of more than forty years' standing, and, if not reversed, constitutes an unwarranted and burdensome intrusion in the realm of orderly administration of interstate rates and charges under the Interstate Commerce Act. It holds that an interlocutory order of the Commission, issued pending a hearing and final decision on the lawfulness of rates under Section 15(7) of the Interstate Commerce Act, is subject to judicial review and illegal and void if not supported by findings. It reaches that result in disregard of legal principles hitherto generally accepted and on misconception of the provisions of the Administrative Procedure Act. The decision below is in conflict with the rulings of every court that has dealt with the issue and fails moreover to give proper effect to the decisions of this court governing the scope of the Administrative Procedure Act.

1. In 1910, Congress, in the Mann-Elkins amendment of the Interstate Commerce Act, first authorized the Commission, on the filing of rates by interstate rail carriers, to suspend the operation of the rates for a stated period. This authority is presently embodied in Section 15(7) of the Interstate Commerce Act [49 U. S. C. 15(7)]. Insofar as pertinent here, Section 15(7) provides that the Commission, pending a hearing and decision on the lawfulness of a new rate schedule filed with it "may from time to time suspend the operation of such schedule and defer the use of

such rate * * *, but not for a longer period than seven months beyond the time when it would otherwise go into effect * * *." Congress thus sought to protect a carrier's traditional right to initiate its own rates while at the same time protecting the rights of the public against prima facie unreasonable changes in the rate structure pending a final determination. The task of reconciling these sometimes conflicting interests in a particular case was committed wholly to the Commission's discretion. *Board of Commissioners v. Great Northern R. Co., 281 U. S. 412, 429.*

Since enactment of the Mann-Elkins Amendment, Commission decisions relating to the granting or denying suspension under Section 15(7) and comparable provisions of the Act have been held nonreviewable by every court that has dealt with the issue. *M. C. Kiser & Co. v. Central of Georgia Ry. Co., 236 Fed. 573 (S. D. Ga. 1916), affirmed 239 Fed. 718 (C. A. 5 1917); Algoma Coal & Coke Co. v. United States, 11 F. Supp. 487, 495 (D. Va. 1935) (three-judge court); Merchant Truckmen's Bureau v. United States, 16 F. Supp. 998, 1000 (S. D. N. Y. 1936); Manhattan Transit Co. v. United States, 24 F. Supp. 174, 177 (D. Mass. 1938) (three-judge court); Carlson v. United States, 107 F. Supp. 398 (S. D. N. Y. 1952) (three-judge court); National Water Carriers Ass'n v. United States, 126 F. Supp. 87, 90-91 (S. D. N. Y. 1954) (three-judge court).*

Despite these precedents the opinion of the District Court holds that the order of the Commission in this instance is

subject to review under the provisions of Section 10 of the Administrative Procedure Act (5 U. S. C. 1009).

But the Administrative Procedure Act, by its own terms and its legislative history, has not conferred upon the Court any additional reviewing powers which it did not have in the past. The Court in *Olin Industries, Inc. v. National Labor Relations Board, 72 Fed. Supp. 225*, made this abundantly clear when it stated at page 228:

> "Both the terms of this section, and its legislative history, make it clear that Section 10 is merely declaratory of the existing law of judicial review and that it neither confers jurisdiction on this court above and beyond that which it already has, nor grants to aggrieved parties any rights they did not have under the National Labor Relations Act."

To the same effect is the unanimous opinion of the three-judge court in *Atchison, Topeka & Santa Fe Railway Co. v. United States, 130 F. Supp. 76*, at page 78:

> "Plaintiffs also refer to Section 10 of the Administrative Procedure Act, 5 U. S. C. A., Sec. 1009, but it is clear that that Act merely was a declaration of existing law where judicial review is provided."

It is equally clear that existing law declares that the granting or denial of suspension of a proposed rate is discretionary with the Commission and its refusal to suspend a rate is not judicially reviewable.

Moreover the first sentence of Section 10 states two basic exceptions to the coverage of this section:

> "Except so far as (1) statutes preclude judicial review or (2) *agency action is by law committed to agency discretion.*" (Emphasis supplied.)

The legislative history regarding this exception points out that—

> "*Matters of discretion are necessarily exempt from the section, since otherwise courts would in effect supersede agency functioning.* But that does not mean that questions of law properly presented are withdrawn from reviewing courts. *Where laws are so broadly drawn that agencies have large discretion, the situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administrative powers.* * * *." (Emphasis supplied.) (House Committee Rep. 1946, p. 41; S. Doc. 248 79th Cong., p. 275.)

Congress clearly intended that the suspension procedure should be flexible and wholly within the sound discretion of the Commission. *M. C. Kiser & Co. v. Central of Georgia Ry. Co., 236 Fed. 573, 577 (S. D. Ga., 1916), affirmed, 239 Fed. 718 (C. A. 5, 1917)*, and cited with approval in *Skinner & Eddy Corp. v. United States, 249 U. S. 557, 565.* An order relating to suspension is but a preliminary step in an administrative proceeding, *Ewing v. Mytinger & Casselberry, 339 U. S. 594, 598*, and in no conceivable way can it be considered a final determination of the reasonableness of rates and practices. The Commission's decision necessarily depends on the Commission's expertness in the field rather than the scant record before it.

There were almost 5,000 suspension requests filed against over 4,000 rate adjustments disposed of by the Commission during the period November 1, 1954, to November 1, 1955. *69th Annual Report of the Commission,*

pages 101-102. If the District Court's unprecedented action is permitted to stand, then the Commission's action in each instance, granting or denying the suspension request, would be subject to review. The inevitable result, aside from an intolerable burden of litigation, would be an unwarranted and burdensome encroachment in the field of carrier administration committed by law to the Interstate Commerce Commission.

2. The decision below voided *ab initio* an interim order of the Commission upon the ground that the Commission failed to support its order with findings as required by Section 8 of the Administrative Procedure Act. Section 8 of the Administrative Procedure Act, by its express terms, has no application to the granting or denial of suspension by the Commission.

At the outset Section 8 states:

> "In cases in which a *hearing* is required to be conducted in conformity with Section 7 * * *." (Emphasis supplied.)

This language necessarily qualifies the balance of Section 8, including the provisions of 8(b) relating to findings upon which the Court relied in voiding the order here. Therefore, unless "a hearing * * * conducted in conformity with Section 7" is a prerequisite to Commission action granting or denying suspension, the Commission is not required by Section 8(b) to support its order of November 14, 1955, by findings.

The Senate Report of 1945 on the Administrative Procedure Act clearly indicated the thinking of Congress when it considered the enactment of Section 8. It said:

> "Like section 7, upon which section 8 depends, this section is supplementary to sections 4 and 5 in cases in which *agency action is required to be taken after hearing provided by statute* and not otherwise excepted from the operation of sections 4 or 5. (Senate Committee Report, 1945, p. 23; S. Doc. 248, 79th Congress, p. 209.)
>
> "Sections 4 and 5 prescribe the basic requirements for the making of rules and the adjudication of particular cases. *In each case, where other statutes require opportunity for an agency hearing, sections 7 and 8 set forth the minimum requirements for such hearings* and the agency decisions thereafter, while section 11 provides for the appointment and tenure of examiners who may participate." (Emphasis supplied.)

In considering the applicability of the Administrative Procedure Act to the instant proceeding, resort must be made to other relevant provisions of the Act. This proceeding involves the making of rates which the courts have universally recognized as a legislative function. *Peik v. Chicago N. W. R. Co., 94 U. S. 164; Reagan v. Farmers' Loan & T. Co., 154 U. S. 362; Simpson v. Shepard (Minnesota Rate Cases), 230 U. S. 352; Louisville & N. R. Co. v. Garrett, 231 U. S. 298; Loomis v. Lehigh Valley R. Co., 240 U. S. 43; Terminal R. Asso. v. U. S., 266 U. S. 17; Atchison, T. & S. F. Ry. Co. v. U. S., 232 U. S. 199, 221; cf. F. C. C. v. Pottsville Broadcasting Co., 309 U. S. 134,*

144. The provisions of Section 2 of the Administrative Procedure Act, 5 U. S. C. 1001, sets forth the definitions of the terms used in that act. Section 2(c), referring to rules and rule making, states in part:

> "Rule means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and *includes the approval or prescription for the future of rates,* * * *." (Emphasis supplied.)

The drafters of the Administrative Procedure Act, cognizant of the separation of functions of our type of government, properly placed rate making as performed by an administrative agency within the scope of those provisions of the Administrative Procedure Act referring to rules and rule making. Section 4 of the Act, 5 U. S. C. 1003, establishes the procedure to be followed by an administrative agency in rule-making functions. Section 4(b) specifically limits the application of Sections 7 and 8 to cases "Where rules are required by statute to be made on the record after opportunity for an agency hearing * * *." And the legislative history upon this portion of the Act emphatically indicates that Congress did not intend to make rate-making procedures of the type challenged here subject to the requirements of the provisions of Sections 7 and 8. The Senate Judiciary Committee Print of June, 1945 (reprinted in Administrative Procedure Act—Legislative History, Sen-

ate Document No. 248, 79th Cong., 2d Sess., at pages 19 and 20), states:

> "This subjection, which provides for public rule making procedures, applies only to the type of rules for which notice is required by subsection (a) above —that is, substantive rules, which involve true administrative legislation. As to that type of rules, moreover, it leaves agencies free to choose from the several common types of informal public rule making procedures, the simplest of which is to permit interested persons to submit written views or data, except where Congress has required that rules be issued only upon a hearing. In the latter case, the hearing and decision procedures of sections 7 and 8 necessarily apply. Thus, the provision does not extend present requirements except to require agencies, in the issuance of substantive rules, to permit at least the submission of written views or suggestions.
>
> * * * * *
>
> "It should be noted that no requirement of formal administrative hearing is imposed except where Congress has by some other statute required that rules be issued upon hearing."

In *American Trucking Ass'ns v. United States, 344 U.S. 298*, this Court, at pages 319-320, stated:

> "* * * For Sec. 7 of the Administrative Procedure Act is limited by its own terms to 'hearings which section 4 or 5 requires to be conducted pursuant to this section.' Turning to those sections, it is found that they invoke Sec. 7 only when specified by statute: 'Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.' In short, Sec. 7 applies only when hearings were required by the statute under which they were conducted to be

made on the record and with opportunity for oral hearing."

This court then went on to say at page 320:

> "Similar reasoning supports our conclusion that Sec. 8(b) of the Administrative Procedure Act, which requires that decisions shall 'include a statement of (1) findings and conclusions,' invoked by appellants in No. 26, is likewise inapplicable. *For it, in turn, is limited to a 'hearing * * * required to be conducted in conformity with section 7'.*" (Emphasis supplied.)

In *Air Line Pilots Ass'n, Internat'l v. Civil Aeronautics Bd.*, *215 Fed. 2d 122*, Justice Harlan, then sitting on the United States Court of Appeals for the Second Circuit, pointed out at page 124:

> "It is also claimed that the procedure followed by the Board failed to meet the requirements of the Administrative Procedure and Civil Aeronautics Acts. I think this is not so. The Special Air Regulation involved here is easily within the definiton of a 'rule' as contained in Sec. 2 of the Administrative Procedure Act, 5 U. S. C. A., Sec. 1001(c). And the procedure pursued by the Board conforms to the 'rule-making' requirements of Sec. 4 of that Act, 5 U. S. C. A., Sec. 1003. Petitioners had actual notice of proposed rule-making and were afforded an opportunity, of which they availed themselves, to participate in the proceedings through submission of written data, views, and oral argument.
>
> "The fact that the Board did not proceed by way of the more formal route provided in Sections 7, 8 of the Administrative Procedure Act, 5 U. S. C. A., Sections 1006, 1007, is of no moment in this proceeding, since such procedure is required only where 'rules are required by statute to be made on the record after op-

> portunity for an agency hearing.' Section 4, A. P. A., 5 U. S. C. A., Section 1003(b); see American Trucking Ass'ns v. United States, 1953, 344 U. S. 298, 319-320, 73 S. Ct. 307, 97 L. Ed. 337. No such requirement is to be found in the Civil Aeronautics Act. Even if the Board had acted via its pending general rule-making proceedings, the petitioners would have been entitled to no more formal hearing than they received in this instance."

See also *Eastern Air Lines v. Civil Aeronautics Bd., 185 Fed. 2d 426, 427-428; Cook-Cleland Catalina Airways v. Civil Aeronautics Bd., 195 F. 2d 206, 207 (1952); Kenny v. United States, 103 F. Supp. 971*, and *George A. Rheman Company v. United States, 133 F. Supp. 668, 673.*

Section 15(7) of the *Interstate Commerce Act, 49 U. S. C. 15(7)*, provides in part:

> "* * * the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby *a statement in writing of its reasons for such suspension*, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, * * *." (Emphasis supplied.)

Nowhere in the provisions of Section 15(7) has Congress indicated in any manner that before the Commission suspends rates a hearing is required and the same is equally true with respect to the refusal to suspend rates. Section 15(7) does admonish the Commission to provide "a statement in writing of its reasons" for suspension to the carrier whose rates are suspended, but the Act is devoid of any insinuation that reasons must be given for refusal to suspend or where it vacates a prior suspension order. It follows

that Section 8(b) of the Administrative Procedure Act, which states in part—

> "* * * All decisions * * * shall * * * include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; * * *."

has no application whatsoever to the action taken by the Commission in this case.

3. The opinion below establishes the further erroneous precedent of invalidating rates which were in effect for over two months and requiring observance of rates which were lawfully canceled.

On November 24, 1955, the reduced rates in issue went into effect and were in effect until voided by the lower court. In their complaint (p. 11), in connection with their unsuccessful request for a temporary restraining order, plaintiffs allege: "Once a schedule becomes effective there is considerable doubt whether in a subsequent setting aside of the Commission's order could, in law, have the effect of cancelling the schedules."

With this allegation we agree. The Commission's power to set aside rates already in effect is limited by the restrictions of Section 15(1) of the Interstate Commerce Act [49 U. S. C. 15(1)], including the requirements of a "full-hearing." To compel the Commission to take such action without such a hearing would be to compel it to disregard the limitations on its authority. The grant of power to the Commission to suspend rates *prior* to their effective date,

was itself a radical innovation in transportation law. It represented, as already noted, an exception to the traditional right of carriers to initiate their own rates. The effect of the District Court decision is to suspend rates *after* they have gone into effect, but before a "full hearing." Since the step is obviously beyond the limitation of the Commission's authority, it must naturally follow that it is likewise beyond the power of the Court.

In essence, the Court is engaged in the making of rates which have been universally recognized as beyond the scope of judicial power. If the Court's opinion is permitted to stand it will give impetus to innumerable court actions to test the validity of thousands of cases in which the Commission suspended or refused to suspend rates. In addition, none of the hundreds of those carrier-made rates filed each year (69th Annual Report of the Commission, p. 101) could be relied upon as a legal charge until they have been tested in the courts. The impact of such a situation upon the transportation industry and the business world would be disastrous.

This case well illustrates one of the dangers implicit in such a far-reaching doctrine. The lower court's judgment entered January 24, 1956, sets aside the Commission's order of November 14, 1955, as "void *ab initio*." The result of this judgment is that for over nine weeks the intervening railroads collected freight charges below the legal

rate, and that these railroads are now obligated under the Elkins Act to collect from its shippers for undercharges, i.e. the difference between the charges actually paid and the higher rate previously in force, 49 U. S. C. Sec. 41, et seq. The sales price of the commodity has reflected what was believed to have been the correct transportation charges. If the lower court is correct that the higher rate should prevail, then assuredly the sales prices have been too low. If the carrier proceeds against the shipper for undercharges, it is unlikely he has any way of readjusting his past prices for sales already made to reflect the higher transportation charges. Moreover, if reductions in the rates are postponed as they have been by the lower court's decision, and it is later found that the plaintiffs had no basis for their position, there is no way to compensate the shipper or receiver for having had to pay the higher rate. Since, therefore, the question of the correctness of the intervening charges depends entirely on the validity of the lower court's decision, the expiration of the period of suspension and the effectiveness of the schedules does not render the case moot.

It is submitted that the decision of the District Court fails to recognize the plenary authority granted to the Commission by the Interstate Commerce Act to grant or deny suspension of new rates, that it misconstrues and misapplies the provisions of the Administrative Procedure Act, and that it exceeds the scope of judicial power by engaging

in the making of rates with seriously disruptive effects upon the transportation industry and the business world. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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Dallas 2, Texas,
Counsel for Southwestern Railroads, Defendants-Appellants.

Of Counsel.
WM. R. MC DOWELL,
May 18, 1956

PROOF OF SERVICE

I, J. T. Suggs, one of the Attorneys for the Southwestern Railroads, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 25th day of May, 1956, I served copy of the foregoing Statement as to Jurisdiction on the several parties thereto as follows:

1. Amarillo-Borger Express, Inc., Best Motor Freight, Knaus Truck Lines, Inc., Leeway Motor Freight, Inc., Merchant's Fast Motor Lines, Inc., Strickland Transportation Company, Inc., Sunset Motor Lines, Inc., Yellow Transit Freight Lines, Inc., Plaintiffs, by mailing a copy in a duly addressed envelope with first-class postage prepaid to their Attorney of Record, Ralph W. Currie, Esq., at his office in the Praetorian Building, Dallas 2, Texas.

2. On the United States by leaving a copy thereof at the office of Heard L. Floore, Esq., United States Attorney for the Northern District of Texas, at his office in the Federal Building at Dallas, Texas, and by mailing a copy in a duly addressed envelope with air-mail postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D. C.

3. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope, with air-mail postage prepaid to Robert W. Ginnane, Esq., its Chief Counsel, at the office of the Commission, Washington 25, D. C.

J. T. SUGGS,
914 Texas and Pacific Bldg.,
Dallas 2, Texas,
Counsel for Southwestern Railroads, Defendants-Appellants.

APPENDIX A

The Southwestern Railroads are as follows:

Arkansas & Louisiana Missouri Railway Company.

The Atchison, Topeka and Santa Fe Railway Company.

Gulf, Colorado and Santa Fe Railway Company.

Panhandle and Santa Fe Railway Company.

Chicago, Rock Island and Pacific Railroad Company.

The Colorado and Southern Railway Company.

Fort Worth and Denver City Railway Company.

Illinois Central Railroad Company.

The Kansas City Southern Railway Company.

Louisiana & Arkansas Railway Company.

The Arkansas Western Railway Company.

Fort Smith and Van Buren Railway Company.

Midland Valley Railroad Company.

Kansas, Oklahoma & Gulf Railway Company.

Oklahoma City-Ada-Atoka Railway Company.

Missouri-Kansas-Texas Railroad Company.

Missouri-Kansas-Texas Railroad Company of Texas.

Beaver, Meade and Englewood Railroad Company.

Missouri Pacific Railroad Company.

St. Louis Southwestern Railway Company.

St. Louis-San Francisco Railway Company.

St. Louis, San Francisco and Texas Railway Company.

Quanah, Acme & Pacific Railway Company.

Southern Pacific Company.

Texas and New Orleans Railroad Company.

The Texas and Pacific Railway Company.

Abilene & Southern Railway Company.

The Denison and Pacific Suburban Railway Company.

Texas-New Mexico Railway Company.

Texas Short Line Railway Company.

The Weatherford, Mineral Wells and Northwestern Railway Co.

The Texas Mexican Railway Company.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action No. 6289

AMARILLO-BORGER EXPRESS, INC., *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

Before BROWN, Circuit Judge, ATWELL and ESTES, District Judges, BROWN, Circuit Judge:

This is another skirmish in the running battle over freight rates for transportation of carbon black from the Southwestern area to the industrial area in the East. The precise question presented is whether the Interstate Commerce Commission's action in vacating a prior suspension of proposed rail rates was proper and, preliminary to that, whether such Commission act is reviewable at all.[1] We hold that it is, and that the action was improper.

[1]The complaint filed by interested Motor Carriers is for review by statutory three-judge court, 28 U. S. C. A. 1336, 1398, 2284, 2321 to 2325.

Carbon black is an important product of natural gas. Consequently, the principal production is in that portion of United States known in the traffic world as the Southwestern area. With extensive natural gas activities, Texas is a leading producer. The principal consumers are the manufacturers of rubber goods, primarily automobile tires, one of the chief and typical consuming points being Akron, Ohio. Transportation of carbon black by Motor Carriers is important to them as it furnishes a substantial tonnage for movement from the Southwest to the Ohio area which would otherwise be a dead haul since the predominant long haul Motor Carrier traffic moves *to* the Southwest. Until 1954, the rates were apparently competitive between rail and motor carriers.

The controversy, of which the present action is the latest part, originated in 1954. Translating the problem from abstract concepts into a typical illustration of the operation of the rates better demonstrates the significance of the actions taken and its vital importance in the economic existence of complainants. A typical illustration on which there is no dispute is the rate from points in the Texas Panhandle to Akron, Ohio. The pre-1954 rate for motor carrier was $1.53 per cwt; the rail rate was approximately $1.56 cwt. The slight difference, we are told, was in the operation of the blanket general increases.

In the early part of 1954, the rail carriers published certain schedules which established a substantial differential

in their favor below motor carrier rates. The rail rate which had been $1.56 was reduced to $1.4785 cwt. The differential was then 5.15 cents below the motor carrier rate ($1.53). These schedules were permitted to become effective.

Thereafter, the motor carriers (which included the complainants here) filed schedules which, they asserted, were designed to meet this new scale and restore the competitive parity which had formerly existed. However, upon the filing of these schedules, the competing rail carriers petitioned the Interstate Commerce Commission to suspend them, and this was done. The Commission ordered an investigation of these proposed motor carrier rates which it had suspended. This hearing was held in July, 1954. The Trial Examiner, upon hearing and consideration, filed a report in which he recommended that the Commission find that the motor carriers' reduction in rates was justified and lawful. The rail carriers, as permitted under the practice of the Commission, filed Exceptions to the Report, and the matter is now pending undecided before the Commission. There is no indication before us concerning the reasons for this delay or the time in which final decision is likely.[2] The seven months' statutory period, 49 U. S. C. A. 15(7), for

[2]After decision by the appropriate Division, the rules permit a petition for rehearing and consideration before the full Commission, a procedure which, with further briefs, inevitably involves many months' time; and, upon completion of Commission review, interested parties can precipitate judicial review. If the past is any guide, it is improbable that a final decision would be achieved under a year.

suspension expired, but in accordance with the administrative practice followed generally, the period of suspension was extended until the matter was finally determined,[3] the effect of which is to freeze the motor carrier rates at their pre-1954 level ($1.53 cwt).

Notwithstanding the fact that the rail carriers through this situation were enjoying a 5.15 cents differential, they filed tariffs to become effective September 24, 1955, to establish a new schedule of rates substantially below their earlier reduced scale. For the typical movement, the proposed rate was $1.33 compared to the rail's 1954 rate of $1.4785, and the motor carriers' frozen rate of $1.53.

Through their authorized freight bureaus, the motor carriers, including Complainants, filed petitions with the Commission requesting the Commission to suspend the proposed schedules because they were unlawful, would result in rates and charges which would be unjust and unreasonable and constitute unfair and destructive competition contrary to the National Transportation Policy. Replies were filed by interested parties, including the railroads. In a conference

[3]Apparently out of recognition of the physical impossibility of the Commission rendering a decision in these complex matters without adequate hearings, opportunity for preparation of constructive briefs, the submission and argument of interested parties and time for consideration and decision—a process which can seldom be done in seven months—it appears to be the universal practice of all regulated carriers concerned to agree to the continuation of a suspension once issued. On argument here, counsel for both rail and motor carriers assumed that this time-honored practice would be followed if, by our action, the prior suspension order was reinstated. Consequently, the matter goes way beyond April 23, 1956.

hearing September 21, 1955, the Suspension Board[4] declined to suspend. On September 23, 1955, Division 2, acting as an Appellate Division on suspension matters, issued its order suspending the proposed schedules and directing an investigation. The significant portion of this order[5] states:

> "*And it further appearing*, That upon consideration of the said schedules and protests thereto there is reason to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy; and good cause appearing therefor:"

Petitions for reconsideration by rail carriers and certain shippers were filed, and on November 14, 1955, Division 2

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[4]A board of Commission employees established for the purpose of handling suspension matters pursuant to 49 U. S. C. A. 17(2), §7.3, 20 FR 5031-5035, July 14, 1955.

[5]Investigation and suspension docket No. 6476 Carbon Black—Southwest to U. S. A. & Canada.

"*It appearing*, That there have been filed with the Interstate Commerce Commission tariff schedules setting forth new reduced rates and charges, and new rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce, to become effective September 24, 1955, and later, designated as follows:"

(Railroad tariffs are described)

(then follows paragraph quoted in text above)

"*It is ordered*, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges and regulations contained in such schedules, with a view to making such findings and orders in the premise as the facts and circumstances shall warrant.

"*It is further ordered*, That the operation of the said schedules be and it hereby is suspended, and that the use thereof on interstate and foreign commerce be deferred to and including April 23, 1956, unless otherwise ordered by this Commission."

vacated[6] its prior order of suspension. The only "finding" by the Commission[7] was:

> "*It further appearing*, That consideration has been given to petitions of the respondents requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor:"

The result of these administrative proceedings is that motor carriers because of the railroads' successful petitions for suspension are bound by their pre-1954 rates, while the railroads compete for this traffic at drastically reduced rates during the many months ahead when the lawfulness of these rail rates is under review.[8]

By motion and defense the Commission, the United States, and intervening railroads assert that the matter is beyond the power of review by this court because the grant-

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[6]"*It appearing*, That by an order dated September 23, 1955, the Commission, Division 2, acting as an appellate division, entered upon an investigation concerning the lawfulness of certain rate and charges and the regulations and practices stated in schedules designated therein, and suspended the operation of the said schedules to and including April 23, 1956;

"*It further appearing*, That consideration has been given to petitions of the respondents requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor:

"*It is ordered*, That the said order of September 23, 1955, be, and the same is hereby vacated and set aside as of November 24, 1955, insofar as it suspended the operation of the schedules designated therein, but that the proceeding of investigation of said schedules shall continue in full force and effect."

[7]By order November 23, 1955, the full Commission denied the petition of motor carriers to waive their rule according administrative finality to suspension orders of Division 2, to stay the effectiveness of the order of November 14 and assign the whole matter for argument before the full Commission. The action under review, therefore, is that of the Commission, and not just a Division thereof.

[8]While the order of suspension September 23, 1955, was still effective, the Commission November 1, 1955, set the hearings on the investigation phase November 29, 1955, at Dallas. November 16, two days after the vacation of suspension, the Commission postponed indefinitely the hearings scheduled for November 29. The hearings are now scheduled to commence February 2, 1956.

ing or denial of a suspension is a matter committed wholly to the Interstate Commerce Commission; that complainants have failed to exhaust their administrative remedies and, in any case, even though the order vacating suspension was illegal,[9] both court and Commission are powerless to suspend the rail schedules which have thus become effective or reinstate the prior rates.

As the economic consequence of the Commission's action, if wrong, is so adverse we must be certain that the administrative processes which produce this result comply with the spirit and the rules of law.

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[9]The suggestion was also made that complainants showed no irreparable injury entitling them to an injunction. Since, as competing carriers, they are clearly an aggrieved party entitled to complain of Commission action, Alton R. Co. v. United States, 315 U. S. 15, 86 L. Ed. 586; Chicago St. P. M. & O. Ry. Co. v. United States (D. C. Minn.), 50 Fed. Supp. 249, affd. 322 U. S. 1, 88 L. Ed. 1093; cf. F. C. C. v. Sanders Brothers Radio Station, 309 U. S. 470, 84 L. Ed. 869; Interstate Com. Com. v. Oregon-Wash. R. Co., 288 U. S. 14, 25, 77 L. Ed. 588, 596; American President Lines v. Federal Maritime Board (D. C. D. C.), 112 Fed. Supp. 346, 349, it is our view that if, as we hold, the action is found to be "(1) not in accordance with law * * * (4) without observance of procedure required by law," 1009(e), Administrative Procedure Act, 5 U. S. C. A. 1001 et seq., it is the duty of the court to set it aside and a complainant who qualifies as a statutory "aggrieved person" need not further show that he will suffer a specific dollar loss for unlawful action of a governmental agency. In any case, by suggestion of the Court on hearing and agreement of counsel, affidavits and counteraffidavits were filed in lieu of oral testimony upon which we find, as a fact, that the movement of carbon black from the Southwestern area to the Eastern part of the United States is an important, vital part of complainants' business, producing substantial revenues which, in all likelihood will be substantially reduced in view of the widespread differentials in favor of railroad transportation. Complainants had already received letters and similar inquiries from shippers and similar trade representatives inquiring what steps were to be taken to meet the rail competition after vacation of the suspension order. The rail's action in successfully obtaining suspension of the motor carriers' 1954 schedules manifests the carrier approach to the dominant significance of the differential in rates as the principal basis for traffic diversion. And, of course, by its order of September 23, the Commission found the probability of destructive competition.

In this approach, we do not, as the defendants fear we must, substitute ourselves for the Commission or pass judgment, at this time, upon the intrinsic merits of the question of the lawfulness or unlawfulness of the rail tariffs or the ultimate granting or denial of a suspension. Ours is the important, but much narrower, inquiry: under the circumstances presented here, was the action of the Commission in vacating the suspension lawful and proper?[10]

Of course, at the bottom, is the fact that a suspension order was issued on a finding of dominant significance. The order stated in categorical terms that, upon the record then before the Suspension Board and Division 2, on appeal, there was, "reason to believe that they (rates) would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the * * * act and constitute unfair and destructive competitive practices in

[10]The action we review is not the failure of the Commission to suspend, nor are we confronted with the question of reviewability, or extent thereof, of Commission action, taken with proper regard to substantive and procedural requirements, declining to suspend proposed rates, such as that involved in the cases pressed on us so heavily by defendants: Carlsen v. United States (S. D. N. Y.) (three-Judge), 107 Fed. Supp. 398; Algoma Coal & Coke Company, et al. v. United States (D. C. Va., 1935) (three-Judge), 11 Fed. Supp. 487; M. C. Kiser Co. v. Central of Georgia Railway (D. C. Ga.), 236 Fed. 573, Affd. 5 Cir., 239 Fed. 718; Manhattan Transit Co., Inc. v. United States (D. C. Mass.) (three-Judge), 24 Fed. Supp. 174; National Water Carriers Association v. United States (S. D. N. Y.) (three-Judge), 126 Fed. Supp. 87; Merchants Truckmen's Bureau v. United States (S. D. N. Y.), 16 Fed. Supp. 998. In some, it must be recognized, language so sweeping is used that, if followed literally, would put suspension actions by the Commission beyond the pale, a concept wholly out of harmony with the moving spirit of the Administrative Procedure Act and the underlying force of Judge Hutcheson's opinion, Ferguson-Steere Motor Co. v. United States (N. D. Tex. 1954) (three-Judge), 126 Fed. Supp. 588, 591, that such orders, as other Commission action, are subject to judicial scrutiny to determine legality and whether administrative discretion was exercised at all, and if so, whether abused.

contravention of the National Transportation Policy." These are plain, emphatic words of strong meaning. Of course, neither the United States nor the Commission can assert that such virile language must be disregarded as routine, stereotyped bureaucratic formulae for the Commission was under a dual[11] statutory obligation adequately to state its reasons for the suspension order. Since all reviewing courts are admonished, and we are here through specific citation in the briefs before us, to accord to Commission action a presumption of legality, United States v. Chemical Foundation, 272 U. S. 1, 14, 15; Baltimore and Ohio R. Co. v. United States, 293 U. S. 349, 358, 360; Federal Power Commission v. Hope National Gas Co., 320 U. S. 591, 602, we think that all parties were entitled to take this for its face value as a deliberate, responsible, articu-

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[11]The first is in 15(7) of the Interstate Commerce Act, 49 U. S. C. A. 15(7):

"Whenever there shall be filed with the commission any schedule stating a new * * *, fare, or charge, or any new * * *, or any new * * * regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, * * *, but upon reasonable notice, to enter upon a hearing concerning the lawfuless of such rate, fare, * * *, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a *statement in writing of its reasons* for such suspension, may from time to time *suspend* the operation of such schedule and defer the use of such rate, fare, * * *, but not for a longer period than seven months beyond the time when it would otherwise go into effect; * * *. At any hearing involving a change in a rate, fare, * * *, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, * * * is just and reasonable, * * *." (Emphasis supplied.)

The second is in the Administrative Procedure Act 8, 49 U. S. C. A. 1007:

"* * * All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, *as well as the reasons or basis thereof*, upon all the material issues of fact, law or discretion presented on the record; * * *." (Emphasis supplied.)

late finding that the proposed rates would produce these results which, contravening the National Transportation Policy, would be destructive of a sound system of national transport, Act September 18, 1940, c. 722, Title I, Section 1, 54 Stat. 899.

But these findings, decisive and significant in nature, made in scrupulous regard for statutory mandate were, by the order of vacation, swept away without the slightest indication of the existence of facts, an adequate description of them, or even the barest statement of reasons underlying the Commission's change of heart. The propriety of its action, on the external record, must be tested under the simple, brief phrase, "and good cause appearing therefor."[12]

If the cryptic phrase "good cause appearing" is a sufficient indication of action, it will be a self-generating bar to any review since, "the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based," S. E. C. v. Schenery Corp., 318 U. S. 80, 87 L. Ed. 626. It is precisely because the scope of judicial review is so narrowly limited, that administrative agencies must, in terms beyond the statutory rubric, reveal the basis for their action by which to judge whether it has met the elemental standards of our

[12]The second and significant paragraph of the order read: "It further appearing, that consideration has been given to the petitions of the respondents (railroads and some shippers) requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor;" Obviously the fact that railroads requested vacation of the order would not be a good ground; nor, as contended by Complainants, do we think that the Commission meant that.

system and statutory requirements. A threshold decision by reviewing court therefore is whether there is a "lack of the basic or essential findings required to support the Commission's order," State of Florida v. United States, 282 U. S. 194, 215, 75 L. Ed. 291; United States v. Baltimore & Ohio R. Co., 293 U. S. 454, 465, 79 L. Ed. 587; Alabama G. S. R. Co. v. United States, 340 U. S. 216, 224, 95 L. Ed. 225; Cantlay & Tanzola v. United States (S. D. Calif.) (three-Judge), 115 Fed. Supp. 72; North Carolina v. United States, 325 U. S. 507, 89 L. Ed. 1760; Atlanta and St. Andrews Bay Railway Co. v. United States, 104 Fed. Supp. 193; Pacific Island Tariff Bureau v. United States, 129 Fed. Supp. 472.

Moreover, this requirement has now been made explicit by the Administrative Procedure Act, 5 U. S. C. A. 1007(b), which requires a statement of findings and conclusions in their ultimate legal form "as well as the reasons or basis therefor." Conceding, as they must, that under Riss and Co., Inc. v. United States, 341 U. S. 907, 95 L. Ed. 1345, the Commission is subject to the Administrative Procedure Act, the United States and the Commission seek to escape its impact in suspension matters on the theory that, since suspension is a matter committed to the discretion of the Commission, it is specifically excepted under Section 1009:

> "1009. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> "(a) * * * any person * * * adversely affected or aggrieved * * *, shall be entitled to judicial review thereof."

Starting with Board of Railroad Commissioners of North Dakota v. Great Northern Railway Co., 281 U. S. 412, which, describing the statutory background of present Section 15(7) concerning suspensions, states, "This power of suspension was entrusted to the Commission only," and relying heavily on *Carlsen*, *Algoma Coal*, *Kiser*, *Manhattan Transit Co.*, and others cited footnote 10, supra, holding that a refusal to suspend is not subject to review, defendants argue that this administrative judgment exempts the whole field from the requirements of the Administrative Procedure Act.

A proper regard for the whole reach of the Administrative Procedure Act and its long legislative history will not support an argument which would automatically remove from its protection substantially every administrative agency to whom was entrusted judgment and discretion in its administrative decision. This language was used to assure that judicial review would not be contrived where it was plain that none was intended, and where the action under inquiry was one wholly within the right of the agency to grant or refuse, allow or deny, with no statutory or similar standard established upon which to base its action. But the exercise of discretion, the making of judgments, and the issuance of sanctions, 5 U. S. C. A. 1001(f), upon the basis of administrative expertise are precisely the matters which Congress in this important legislation in-

tended should be under, not exempt from, the Administrative Procedure Act.[13]

Consequently, we are of the clear opinion that whatever the ultimate scope of judicial review might be on a suspension matter, the Commission is obliged in all stages to respect the requirements, the letter and the spirit of the Administrative Procedure Act. Since both it and the general law concerning the sufficiency of Commission action require an adequate statement of the underlying reasons for the action, we think it evident that the order of vacation did not satisfy these requirements. This order vacat-

[13]The following references to legislative history are found (on pages indicated) in Senate Document No. 258, 79th Congress, Second Session, Administrative Procedure Act, Legislative History:

Report of the Committee on the Judiciary (Report No. 752) at page 212:

"Sec. 10. (now 1009) Judicial Review—*Section 10 on judicial review does not apply in any situation so far as there are involved matters with respect to which statutes preclude judicial review or agency action is by law committed to agency discretion.*

"Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.

"The basic exception of matters committed to agency discretion would apply even if not stated at the outset. If, for example, statutes are drawn in such broad terms that in a given case there is no law to apply, courts of course have no statutory question to review. That situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administrative powers. However, where statutory standards, definitions, or other grants of power deny or require action in given situations or confine an agency within limits as required by theConstitution, then the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record."

Committe on the Judiciary, House of Representatives (House Report No. 1980), pages 275, 276:

"Section 10. * * * (heading same as Senate Committee Report).

"This section requires adequate, fair, effective, complete, and just determination of the rights of any person in properly invoked proceedings.

(Footnote 13, continued on page 36.)

ing the prior one is a part of, and must be read with, it. All that it says is that "good cause appearing" the prior action is rescinded. If it is read as though it were meant to be a repeal, a withdrawal, and rescission of the findings that the rates would (1) be unjust, (2) unreasonable, (3) in violation of the Act, (4) constitute unfair destructive competition, and (5) contravene the National Transportation Policy, the record would yet be inadequate. We do not think the Commission can make serious findings of this nature and then, without more, announce that they no longer exist. The basic facts, the underlying reasons for that action, would require, as a minimum, some discussion of the factors leading the Commission intelligently and as

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(Footnote 13 continued from page 35.)

"* * * (Here follows first paragraph of Senate Committee Report quoted above.) The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.

"Matters of discretion are necessarily exempted from the section, since otherwise courts would in effect supersede agency functioning. But that does not mean that questions of law properly presented are withdrawn from reviewing courts. Where laws are so broadly drawn that agencies have large discretion, the situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administrative powers. However, where statutory standards, definitions, or other grants of power deny or require action in given situations or confine an agency within limits as required by the Constitution, then the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record. In any case the existence of discretion does not prevent a person from bringing a review action but merely prevents him *pro tanto* from prevailing therein."

And in debates in the Senate (Congressional Record March 12, May 24, 25, 27, 1946) during presentation by its distinguished sponsor Senator McCarran, pages 310, 311:

"MR. McCARRAN: I yield.

"MR. DONNELL: I should like to ask the distinguished Senator a question. Section 10 (now 5 U. S. C. A. 1009) of the bill recites in part that—

(Footnote 13 continued on page 37.)

a matter of deliberative judgment in good faith to contrary conclusions. If, as may be suggested by the order of November 14, the Commission felt that there was information contained in the petitions to vacate which justified or required the change in its conclusions, the Commission could easily have given sufficient elaboration of the file record to enable parties, counsel, and reviewing tribunals to determine whether this was the act of genuine judgment, deliberate discretion and reasonable decision, or whether it was hasty, ill considered, precipitous action with no substantial basis for it.

What we have said is certainly correct if it is assumed that the Commission intended its cryptic phrase "good

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(Footnote continued from page 36.)

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

"(a) Right of review: Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"It has occurred to me the contention might be made by someone in undertaking to analyze this measure that in any case in which discretion is committed to an agency, there can be no judicial review of action taken by the agency. The point to which I request the Senator to direct his attention is this: In a case in which a person interested asserts that, although the agency does have a discretion vested in it by law, nevertheless there has been abuse of that discretion, is there any intention on the part of the framers of this bill to preclude a person who claims abuse of discretion from the right to have judicial review of the action so taken by the agency?

"MR. McCARRAN: Mr. President, let me say, in answer to the able Senator that the thought uppermost in presenting this bill is that where an agency without authority or by caprice makes a decision, then it is subject to review.

* * * * *

"MR. DONNELL: But the mere fact that a statute may vest discretion in an agency is not intended, by this bill, to preclude a party in interest from having a review in the event he claims there has been an abuse of that discretion. Is that correct?

"MR. McCARRAN: It must not be an arbitrary discretion. It must be a judicial discretion; it must be a discretion based on sound reasoning."

cause appearing" to wipe away all of its prior fact conclusions. It is all the more so if, as seems likely, the Commission intended that the balance of its order of September 23 calling for investigation of the rates to determine their lawfulness should remain in effect. In expressed terms the only change made by the subsequent order was to vacate the former so far as concerned suspension alone. It literally left in force the findings of unlawfulness, destructive competition, and then, without more than the magic phrase "good cause appearing," determined that what on September 23 led them to suspend now led them to unsuspend. The Commission may, as any other body, have the right to change its mind, but its action must demonstrate the "reasons or basis therefor."

We are equally of the clear opinion that Complainants have the right to challenge and the court has the power to nullify action so illegal and having such immediate and irreparable consequences. Unless the rates are suspended, the Complainants have no protection against this competition until such time as the Commission's decision has become final on the basic investigation or on a complaint under Section 13, 49 U. S. C. A. 13. But under the statutory scheme of Section 15(7), rates can be suspended only within thirty days and then not for a time beyond seven months. If, as we hold it was, the act of the Commission in vacating the prior suspension was illegal, the only possible way for Complainants to secure the benefit of that suspension or to eradicate the devastating consequences of an unlawful vacation of it, was by an immediate appeal and

injunction. In this sense it was no routine, administrative interim action but was truly final in form and effect; once gone, it was irretrievable. There was thus no further administrative machinery or procedure available—much less to be exhausted. Utah Fuel Company v. National Bituminous Coal Commission, 306 U. S. 56; Isbrandtsen Co. v. United States, 211 F. 2d 51; see also opinion of Mr. Justice Douglas, as Circuit Justice, Standard v. Olsen, May 22, 1954, 98 L. Ed. 1151. If the Commission act is allowed to stand, the right to a suspension is forever gone until, months or years later, a decision of the Commission on basic unlawfulness or unreasonableness of the rates becomes final and effective. Complainants may succeed in the investigation proceeding soon to commence, but grinding, as it must, slowly through inevitable judicial review, the motor carriers will have no relief for the traffic which they have lost, diverted to rails, during this long period of time.[14] We do not mean to say that Complainants are entitled to a suspension; but when one has validly issued it can be rescinded only by lawful methods.

Nor can this situation which makes judicial relief from administrative error imperative be turned, as defendants attempt, into the argument that such relief should be denied because the Commission is now powerless to suspend rates once they are in effect. We can assume that by virtue of Sections 6(3), 15(1) and 15(7) of the Act, 49 U. S. C. A.

[14]The provision in 15(7), footnote 11 supra, for protection of shippers after the expiration of the seven months' statutory period of suspension is of no help to competing carriers adversely affected since this relates only to "proposed *increased*" rates, and the requirement to keep accurate records and make refunds of excess payments received in the interim is limited to "the persons in whose behalf such amounts were paid."

6(3), 15(1), 15(7), that suspension must be ordered within thirty days of the initial filing, and where once allowed to become effective from the absence of a suspension order, the Commission cannot thereafter suspend. Skinner and Eddy Corp. v. United States, 249 U. S. 557. But no such thing occurred here. Here, before the rates became effective, a valid suspension order was issued. On the record this suspension order was vacated, but, for the reasons we have detailed, this action was contrary to law. The power of the Commission to continue a suspension validly made (until validly set aside) cannot be altered by illegal action, nor can the carrier (here the rails) upon whose petition the illegal action was taken, assert that their rights to put into effect tariff rates shall be the same as though no such administrative action had taken place. Once the order of November 14 is expunged, the matter is remitted to the situation existing immediately prior to its entry: The rates were then under valid suspension. The power of the Commission does not exhaust itself through its own errors. If it were so, the law would indeed be a straight jacket.

It follows, therefore, that the order of November 14, 1955, vacating the suspension must be declared void, an injunction against its enforcement issued, and the proceedings remanded to the Commission for further and not inconsistent proceedings as though the order had never been made. To effectuate the holding herein, the injunction will forbid the use or application of tariff[15] rates and schedules

[15] Subsequent to November 14, 1955, the railroads filed Supplement 170, published as a new tariff schedule, effective December 31, 1955, but which is, they state, the equivalent of, and restores, the schedules suspended September 23.

which became, or were allowed to become, effective by reason of the vacation of the prior suspension order of September 23, 1955, until such time as the order of September 23, 1955, shall have been rescinded or modified by lawful action of the Commission.

JUDGMENT FOR PLAINTIFF. REMANDED TO THE COMMISSION.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action No. 6289

AMARILLO-BORGER EXPRESS, INC., ET AL.

v.

UNITED STATES OF AMERICA

JUDGMENT

BE IT REMEMBERED, that on December 12, 1955, in the above entitled and numbered cause wherein AMARILLO-BORGER EXPRESS, INC.; BEST MOTOR FREIGHT; KNAUS TRUCK LINE, INC.; LEEWAY MOTOR FREIGHT, INC.; MERCHANT'S FAST MOTOR LINES, INC.; STRICKLAND TRANSPORTATION COMPANY, INC.; SUNSET MOTOR LINES, INC.; and YELLOW TRANSIT FREIGHT LINES, INC., are Complainants; the UNITED STATES OF AMERICA is Defendant; and the Interstate Commerce Commission is intervener on behalf of the Defendant; and the Southwestern Railroads (a group of Railroads whose names are listed in Appendix "A" of this judgment) are likewise intervenors

on behalf of the Defendant, the trial upon its merits came on regularly to be heard before a Court of three judges convened pursuant to law. All parties appeared by counsel and the merits of the cause were fully presented, and the matter was submitted to the Court.

Thereafter, and on January 23, 1956, the Court delivered and filed its unanimous opinion to the effect that the assailed order is void and that the Complainants are entitled to injunctive relief as specified in the said opinion, to which opinion reference is here made.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the order of the Interstate Commerce Commission entered on November 14, 1955, and reading as follows:

> "Order. At a Session of the Interstate Commerce Commission, Division 2, acting as an appellate division, held at its office in Washington, D. C., on the 14th day of November, A. D. 1955. Investigation and Suspension Docket No. 6476. Carbon Black-Southwest to U. S. A. & Canada. *It appearing*, That by an order dated September 28, 1955, the Commission, Division 2, acting as an appellate division, entered upon an investigation concerning the lawfulness of certain rates and charges and the regulations and practices stated in schedules designated therein, and suspended the operation of the said schedules to and including April 23, 1956; *It further appearing*, That consideration has been given to petitions of the respondents requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor; *It is ordered*, That the said order of September 23, 1955, be,

> and the same is hereby, vacated and set aside as of November 24, 1955, insofar as it suspended the operation of the schedules designated therein, but that the proceeding of investigation of said schedules shall continue in full force and effect. By the Commission, Division 2, acting as an appellate division. Harold D. McCoy, Secretary. SEAL."

be, and the same is hereby, declared to be void, ab initio, said order is hereby set aside and its enforcement is hereby restrained and enjoined.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the suspension proceedings out of which the enjoined order arose be, and the same are hereby, remanded to the Interstate Commerce Commission for further and not inconsistent proceedings as though the order of November 14, 1955, had never been entered.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the use in interstate or foreign commerce of Supplement 170 to Southwestern Lines Freight Tariff No. 111-J, ICC No. 3744 (Agent F. C. Kratzmeir) and any and all other Railroad tariff rates and schedules which became or were allowed to become effective by reason of the order of November 14, 1955, (to the extent that they publish rates suspended by the order of September 23, 1955) be and the same is hereby prohibited until such time as the order of September 23, 1955, issued by the Interstate Commerce Commission in its investigation and suspension

Docket No. 6476 shall have been rescinded or modified by lawful action of the Interstate Commerce Commission.

RENDERED AND ENTERED in open Court this 24th day of January, 1956.

/s/ WM. H. ATWELL
United States District Judge

APPROVED FOR ENTRY:

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Attorney for Complainants

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Attorney for United States of America

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Attorney for Interstate Commerce Commission

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Attorney for Southwestern Railroads

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APPENDIX C

ion 15(7) of the Interstate Commerce Act, as
ed, is quoted as follows:

"Whenever there shall be filed with the Commission
ny schedule stating a new individual or joint rate,
are, or charge, or any new individual or joint classi-
cation, or any new individual or joint regulation or
ractice affecting any rate, fare, or charge, the Com-
ission shall have, and it is hereby given, authority,
ther upon complaint or upon its own initiative with-
ut complaint, at once, and if it so orders without an-
ver or other formal pleading by the interested car-
er or carriers, but upon reasonable notice, to enter
pon a hearing concerning the lawfulness of such
ate, fare, charge, classification, regulation, or prac-
ce; and pending such hearing and the decision there-
n the Commission, upon filing with such schedule and
elivering to the carrier or carriers affected thereby
statement in writing of its reasons for such suspen-
on, may from time to time suspend the operation of
uch schedule and defer the use of such rate, fare,
harge, classification, regulation, or practice, but not
or a longer period than seven months beyond the time
hen it would otherwise go into effect; and after full
earing, whether completed before or after the rate,
are, charge, classification, regulation, or practice
oes into effect, the Commission may make such order
ith reference thereto as would be proper in a pro-
eeding initiated after it had become effective. If the
roceeding has not been concluded and an order made
ithin the period of suspension, the proposed change
f rate, fare, charge, classification, regulation, or
ractice shall go into effect at the end of such period;
ut in case of a proposed increased rate or charge for
r in respect to the transportation of property, the
ommission may by order require the interested car-
ier or carriers to keep accurate account in detail of

all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible." [49 U. S. C., 15 (7), 44 Stat. 1447.]

Section 8 of the Administrative Procedure Act, is quoted as follows:

"In cases in which a hearing is required to be conducted in conformity with section 7—

"(a) ACTION BY SUBORDINATES. — In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it

may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision, or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

"(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof." (5 U. S. C., 1007, 60 Stat. 237.)

Section 10 of the Administrative Procedure Act is quoted as follows:

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

"(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"(b) FORM AND VENUE OF ACTION. — The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

"(c) REVIEWABLE ACTS. — Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

"(d) INTERIM RELIEF. — Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may

be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

"(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error." (5 U. S. C., 1009, 60 Stat. 237.)

INDEX

	Page
Opinion below	1
Jurisdiction	1
Statutes involved	2
Questions presented	2
Statement	3
The questions are substantial	5
Conclusion	18
Appendix A	19
Appendix B	37
Appendix C	42
Appendix D	44
Appendix E	45

CITATIONS

Cases:

Algoma Coal & Coke Co. v. *United States*, 11 F. Supp. 487	9
American Trucking Assns. v. *United States*, 344 U. S. 298	2, 14
Atchison, T. & S. F. Ry. Co. v. *United States*, 232 U. S. 199	17
Blackmar v. *Guerre*, 342 U. S. 512	10
Board of R. R. Commissioners of North Dakota v. *Great Northern Ry.*, 281 U. S. 412	2, 11
Board of Commissioners v. *Great Northern R. Co.*, 281 U. S. 412	9
C. & S. Air Lines v. *Waterman S. S. Corp.*, 333 U. S. 103	12
Carlsen v. *United States*, 107 F. Supp. 398	10
Dixie Carriers, Inc. v. *United States*, Civ. Act. 9544, S. D. Tex., Houston Div	13
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U. S. 134	17

390489—56——1

Cases—Continued

	Page
Federal Power Commission v. *Metropolitan Edison Co.*, 304 U. S. 375	12
Ferguson-Steere Motor Co. v. *United States*, 126 F. Supp. 588	10
Florida v. *United States*, 282 U. S. 194	15
Heikkila v. *Barber*, 345 U. S. 229	10, 11
Interstate Commerce Commission v. *Inland Waterways Corp.*, 319 U. S. 671	2, 13, 16
Kiser (M. C.) Co. v. *Central of Georgia Ry. Co.*, 236 Fed. 573, affirmed, 239 Fed. 718	9
Long Island R. R. Co. v. *United States*, Civ. Act. 16321, E. D., N. Y	13
Loomis v. *Lehigh Valley R. Co.*, 240 U. S. 43	17
Louisville & N. R. Co. v. *Garrett*, 231 U. S. 298	17
Manhattan Transit Co. v. *United States*, 24 F. Supp. 174	10
Merchant Truckmen's Bureau v. *United States*, 16 F. Supp. 998	9
National Water Carriers Ass'n v. *United States*, 126 F. Supp. 87	10
Peik v. *Chicago & N. W. R. Co.*, 94 U. S. 164	16
Reagan v. *Farmers' Loan & Trust Co.*, 154 U. S. 362	16
Securities and Exchange Commission v. *Chenery Corp.*, 318 U. S. 80	15
Simpson v. *Shepard*, 230 U. S. 352	16
Skinner & Eddy Corp. v. *United States*, 249 U. S. 557	2, 6
Southern Pacific Co. v. *I. C. C.*, 219 U. S. 433	2
Southern Pacific Terminal Co. v. *I. C. C.*, 219 U. S. 498	2
Stark v. *Wickard*, 321 U. S. 288	11
Terminal R. Assn. v. *United States*, 266 U. S. 17	17
United States v. *George S. Bush & Co.*, 310 U. S. 371	11
Universal Camera Corp. v. *N. L. R. B.*, 340 U. S. 474	10

Statutes and Rules:

Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001, et. seq.:	
Section 8 (b)	14, 15, 48
Section 10	11
Section 10 (a)	10
Section 10 (e)	49

Statutes and Rules—Continued Page

Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C., *et seq.*:
- Section 6 (3) 7, 45
- Section 13 (1) 46
- Section 15 (7) 4, 6, 7, 11, 14, 47
- Section 17 (2) 4, 7

Elkins Act, 49 U. S. C. 41 *et seq* 17
28 U. S. C. 2322 5
28 U. S. C. 2323 5
20 F. R. 1465 9
Interstate Commerce Commission General Rules of Practice, Rule 42, 49 C. F. R. 1.42 ..... 7, 8
Interstate Commerce Commission Special Rules of Practice, 49 C. F. R. 1.200 8
Revised Rules of the Supreme Court, Rule 13.1 2

Miscellaneous:
- Davis, *Administrative Law* (1951) 12
- Interstate Commerce Commission, 69th Annual Report, pp. 101–102 9

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. ____

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

AMARILLO-BORGER EXPRESS, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the District Court is reported in 138 F. Supp. 411. The court's opinion and its final judgment, as well as the Commission's unreported orders of September 23, 1955, and November 14, 1955, are set forth in Appendices A through D, *infra,* pages 19–45.

JURISDICTION

This suit was brought under 28 U. S. C. 1336 to set aside and enjoin enforcement of an order of the Interstate Commerce Commission. The judgment of the District Court was entered on January 24, 1956, and a motion for new trial was overruled on Febru-

ary 21, 1956. Notice of appeal was filed in that court by the United States and the Commission on April 19, 1956.[1] The jurisdiction of this Court to review the judgment on direct appeal is conferred by 28 U. S. C. 1253 and 2101 (b), and is sustained by the following cases: *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557; *Board of Railroad Commissioners of North Dakota* v. *Great Northern Ry.,* 281 U. S. 412; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U. S. 498; *Southern Pacific Co.* v. *Interstate Commerce Commission,* 219 U. S. 433; *Interstate Commerce Commission* v. *Inland Waterways Corp.,* 319 U. S. 671; and *American Trucking Assns.* v. *United States,* 344 U. S. 298.

STATUTES INVOLVED

Sections 6 (3), 13 (1), and 15 (7) of the Interstate Commerce Act (49 U. S. C., Sections 6 (3), 13 (1) and 15 (7)), and Sections 8 (b) and 10 (e) of the Administrative Procedure Act (5 U. S. C., Sections 1007 (b) and 1009 (e)), are set forth in Appendix E, *infra,* pages 45–49.

QUESTIONS PRESENTED

Acting under Section 15 (7) of the Interstate Commerce Act, the Interstate Commerce Commission ordered the suspension of certain proposed rate schedules pending a hearing and decision on the lawfulness of such schedules. Subsequently, on recon-

[1] On June 12, 1956, District Judge Atwell granted an extension until July 2, 1956, for the filing of the Jurisdictional Statement by the United States of America and the Interstate Commerce Commission. Rule 13.1, Revised Rules.

sideration, the Commission vacated the suspension order. After the rate schedules had gone into effect, the District Court set them aside as "void ab initio" on the ground that the Commission's order vacating the suspension was unaccompanied by proper findings. The following questions are presented by this appeal:

1. Whether the Commission's order vacating the suspension is subject to judicial review.

2. Whether the Commission was required to make findings in support of its order vacating the suspension.

3. Whether the District Court erred in enjoining the operation of the rate schedules after they had gone into effect but prior to a final decision on their lawfulness by the Commission.

STATEMENT

On or about August 12, 1955, pursuant to Section 6 (3) of the Interstate Commerce Act, Southwestern and Western trunk-line rail carriers filed with the Commission proposed schedules of reduced rates and charges on carbon black [2] to become effective September 24, 1955. Motor carrier rate bureaus and a motor carrier filed protests against the proposed rates and petitions for their suspension and investigation. Replies to the protests and petitions were filed by the proponents of the rates, including shippers of carbon black. The matter was referred to the Board of Sus-

[2] Carbon black, a byproduct of natural gas, is produced principally in Texas and other Southwestern states. Primary consumers of carbon black are tire manufacturers located in Ohio and other Northern states.

pension[3] of the Commission for initial action. On September 22, 1955, two days before the rates were to become effective, the Board voted not to suspend but to investigate the proposed new rates.[4]

The matter was immediately appealed to Division 2 of the Commission, acting as an appellate division, which entered an order on September 23, 1955 (Appendix C, *infra*, pp. 42–44), suspending the proposed rate schedules "to and including April 23, 1956, unless otherwise ordered by the Commission".

Thereafter, petitions for reconsideration were filed by the proponents of the rates, and replies thereto were filed by the protestants. By order entered November 14, 1955 (Appendix D, *infra*, pp. 44–45), the appellate division vacated the suspension as of November 24, 1955, but directed that the investigation continue. A stay of the November 14 order was denied by the entire Commission on November 23, 1955.

In the meantime, the Commission set the matter down for hearing and so notified the parties on November 1 and 16 and December 6, 1955. Hearings were held before an examiner on February 2 and 3, 1956, at Dallas, Texas.

The present action was commenced by appellees (a group of motor carriers engaged in part in the trans-

[3] The Board of Suspension consists of five employees of the Commission duly constituted as a board pursuant to the provisions of Section 17 (2) of the Act (49 U. S. C. 17 (2)) for the purpose of taking initial action in the investigation and suspension of rates within the provisions of Section 15 (7) of the Act (49 U. S. C. 15 (7)).

[4] At this point, the proceeding before the Commission was styled *Carbon Black—Southwest to U. S. A. and Canada*, Investigation and Suspension Docket No. 6476.

portation of carbon black) on November 23, 1955, one day before the rate schedules were to go into effect under the terms of the challenged November 14 order.[5] The complaint sought, *inter alia*, a temporary restraining order against the November 14 order for the purpose of preventing the rate schedules from going into effect. On the same day, District Judge Atwell denied the request for a temporary restraining order. On November 24, 1955, pursuant to the Commission's November 14 order, the rate schedules in issue went into effect.

On December 12, 1955, the parties were heard before the three-judge court on appellees' application for an interlocutory injunction. On January 23, 1956, the court filed its opinion (Appendix A, *infra*, pp. 19–37), and on January 24, 1956, entered its judgment (Appendix B, *infra*, pp. 37–42). The judgment granted a final injunction setting aside the Commission's November 14 order, remanding the matter to the Commission for further proceedings not inconsistent with the court's opinion, and prohibiting further use of the new rates. On February 21, 1956, the court denied appellants' motion for new trial.

THE QUESTIONS ARE SUBSTANTIAL

The unusual importance of the questions involved in this appeal can be appreciated only in the practical context of the rate-suspension procedure.

[5] In accord with 28 U. S. C. 2322, the United States was named as the defendant. Under 28 U. S. C. 2323, the Commission and the rail carriers involved duly intervened. The rail carriers have taken a separate appeal from the decision below. No. 125, *Arkansas & Louisiana Missouri Railway Co., et al.* v. *Amarillo-Borger Express, Inc., et al.*

390489—56——2

The Interstate Commerce Act contemplates that most railroad rates will be established on the carriers' initiative by filing new tariffs with the Commission and publishing them in accordance with Section 6. Prior to 1910, the Commission could not, either upon a complaint filed under Section 13 or upon its own motion, prevent such carrier-initiated rates from becoming effective. Only after a full hearing could the Commission set aside such rates. See *Skinner & Eddy Corp* v. *United States*, 249 U. S. 557, 564–565.

Beginning with the Mann-Elkins Act of 1910, Congress has empowered the Commission to suspend railroad-initiated rates, before they become effective, for a specified period pending investigation by the Commission. Under the present law, the Commission may suspend such rates for a period not exceeding seven months. At the end of that period, the railroad may put the proposed rates into effect even though the Commission's investigation has not been completed. In any event, the Commission does not make a final decision as to the lawfulness of proposed rates until it completes its formal hearing procedure.

Thus, Section 15 (7) provides that where new rates have been filed with the Commission:

> the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect;

> and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period * * *.

Section 15 (7) does not specify the circumstances in which the Commission is to suspend or not to suspend. The only stated condition is, in the event of a decision to suspend, "filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of [the Commission's] reasons for such suspension."

Under Section 6 (3) of the Act, railroads must give to the Commission and to the public 30 days' notice of proposed rate changes, unless the Commission permits such changes upon shorter notice. Parties desiring to challenge the lawfulness of the proposed rates must file their protests and requests for suspension at least 12 days prior to the effective date of the intended rate changes. 49 C. F. R. 1.42. The matter is thereafter considered by the Board of Suspension, which consists of a board of five employees of the Commission established pursuant to Section 17 (2) of the Interstate Commerce Act, 49 U. S. C. 17 (2), for the purpose of taking initial action.

Indicative of the informality of suspension proceedings are the Commission's rules dealing with the content of protests and the special rules of practice before the Board of Suspension. Rule 42 of the Commission's General Rules of Practice, 49 C. F. R. 1.42, merely requires that the protest should identify the publishing carrier, the tariff and schedules, and specific items protested, and "should state the grounds in support thereof, indicate in what respect the protested tariff or schedule is considered to be unlawful, and state what protestant offers by way of substitution."[6] The rule provides that no protest shall include a prayer that it be considered a formal complaint. If the protestant intends to proceed further against a tariff which has not been suspended, then a formal complaint or petition must be filed.

The special rules of practice governing the procedure of the Board of Suspension, 49 C. F. R. 1.200, state in part: "The proceedings of the Board of Suspension * * * shall be informal. No transcription of such proceedings will be made. Subpoenas will not be issued and, except when applications or petitions are required to be attested [in the case of 4th Section applications], oaths will not be administered." These rules also set out the procedure for obtaining review of actions of the Suspension Board where it fails to suspend rates. Petitions may be filed with the Commission for reconsideration by the designated appellate division—*i. e.*, Division 2

[6] Even telegraphic protests may be filed in the event of an emergency, provided the protestant then submits a pleading complying with the above requirements.

(20 F. R. 1465). Petitions must be filed at least two days prior to the effective date of the tariff.

The reason for such informality—apart from the fact that suspension proceedings represent but a preliminary step in the investigation of proposed rates—is apparent from the number of suspension cases handled annually by the Commission. During the period November 1, 1954, to November 1, 1955, nearly 5,000 requests for suspension were filed against 4,000 rate adjustments. 69th Annual Report of the Commission, pages 101–102. This number becomes even more significant in view of the speed required in disposing of suspension cases. As the procedure outlined above makes clear, the 30-day period of notice is commonly narrowed down to 12 days in which the Commission must decide whether to suspend or not to suspend rates, and to two days in which the appellate division must decide whether to affirm or reverse the board's ruling. This necessity for acting expeditiously makes it impossible to cloak these proceedings with any degree of the formality that characterizes, for example, the subsequent hearing "on the merits" of the complaint against the new rate schedules.

1. The court below apparently concedes that historically the Commission's exercise of its rate suspension powers was not subject to judicial review.[7] However,

[7] See *Board of Commissioners* v. *Great Northern R. Co.*, 281 U. S. 412, 429; *M. C. Kiser Co.* v. *Central of Georgia Ry. Co.*, 236 Fed. 573 (S. D. Ga. 1916), affirmed, 239 Fed. 718 (C. A. 5 1917); *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487, 495 (E. D. Va. 1935) (3-judge court); *Merchant Truckmen's Bureau* v. *United States*, 16 F. Supp. 998, 1000 (S. D. N. Y. 1936);

it found reviewability in the following provisions of Section 10 of the Administrative Procedure Act:

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) *Right of Review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

From these provisions and their ambiguous legislative history,[8] the court concluded that "the exercise of discretion, the making of judgments, and the issuance of sanctions, 5 U. S. C. A. 1001 (f), upon the basis of administrative expertise are precisely the matters which Congress in this important legislation intended should be under, not exempt from, the Administrative Procedure Act." 138 F. Supp. 411, 418. We contend that in so holding the District Court misread Section 10 and misconceived the nature of the suspension procedure.

It is settled that Section 10 did not scrap every rule devised by Congress and the courts for the judicial review of administrative action. *Heikkila* v. *Barber*, 345 U. S. 229; *Blackmar* v. *Guerre*, 342 U. S. 512.

Manhattan Transit Co. v. *United States*, 24 F. Supp. 174, 177 (D. Mass. 1938) (3-judge court); *Carlsen* v. *United States*, 107 F. Supp. 398 (S. D. N. Y. 1952) (3-judge court); *National Water Carriers Ass'n.* v. *United States*, 126 F. Supp. 87, 90-91 (S. D. N. Y. 1954) (3-judge court). See also opinion of Judge Davidson in *Ferguson-Steere Motor Co.* v. *United States*, 126 F. Supp. 588, 592 (N. D. Texas 1954) (3-judge court). A statement in Judge Hutcheson's opinion in *Ferguson-Steere*, *supra*, at 591, apparently constitutes the only judicial expression to the contrary.

[8] *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, 483.

Specifically, as to what administrative actions are reviewable by the courts, the general provisions of Section 10 are reconciled with other legal rules by its introductory clause, which qualifies all of Section 10: "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion— * * *." *Heikkila* v. *Barber, supra.*

Section 15 (7) of the Interstate Commerce Act, providing that the Commission "*may* from time to time suspend the operation" of proposed rates, suggests on its face that the exercise of the suspension power is "agency action by law committed to agency discretion," and thus exempt from judicial review under Section 10 of the Administrative Procedure Act. Such a reading merely reiterates this Court's observation in *Board of Railroad Commissioners* v. *Great Northern Ry. Co.,* 281 U. S. 412, 429, that "This power of suspension was entrusted to the Commission only." It is also in accord with an unbroken line of lower federal court decisions both before and after enactment of the Administrative Procedure Act.[9]

In the instant case, where such review is not required by the Constitution, the purpose of Congress is controlling and that purpose, unless stated expressly, is to be gathered from the kind of administrative action, the procedure from which it ensues, and consequences of such action. Cf. *Stark* v. *Wickard,* 321 U. S. 288. From such a context, it may appear that Congress intended to vest in an agency an unreviewable discretionary power to act or not to act upon certain matters. *United States* v. *George S.*

[9] See note 7, *supra.*

Bush & Co., 310 U. S. 371; *C. & S. Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103; Davis, *Administrative Law* (1951), pp. 842–850. In such cases, the introductory clause of Section 10 insulates that purpose from its general provisions.

As noted above, the exercise of the suspension power conferred by Section 15 (7) is merely a preliminary step in the determination of whether proposed rates are lawful. From the nature of the rate-making procedure prescribed by the Interstate Commerce Act, the Commission's determination to suspend or not to suspend proposed rates (or to vacate a suspension previously ordered) represents a tentative and informal conclusion as to the probable lawfulness of such rates. Such determinations are made rapidly, upon informal and often incomplete presentations, and in large numbers. To a unique extent, such determinations are based so much upon experience, rather than upon a record in the conventional sense, that judicial review is inappropriate. Cf. *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375.

While the decision below deals immediately with an order of the Commission vacating its prior suspension order, its rationale appears to be equally applicable to orders originally suspending or refusing to suspend rates. As already noted, approximately 5,000 requests for suspension action are filed each year. Under the District Court's holding, the Commission's disposition of each request is presumably subject to judicial review.[10] Moreover, the chronology of the in-

[10] Following shortly upon the heels of the decision below, two suits substantially similar to the instant case were filed challenging Commission orders vacating prior orders of suspension.

stant case shows that such review is ordinarily impracticable unless the courts assume, as the court below did, the further power to set aside rates which have already become effective. The result would be serious disruption of long-established rate-making mechanisms. Cf. *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, 689, 691.

2. Even assuming reviewability of the Commission's order of November 14, 1955, the court below erred in setting aside that order on the ground that it was not accompanied by sufficient findings.

The Commission's suspension order of September 23, 1955, stated in part:

> * * * there is reason to believe that they [the proposed rate schedules] would, if permitted to become effective, result in rates and charges, * * * which would be unjust and unreasonable in violation of the Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy; * * *.

This order, suspending the proposed rail rates, was vacated by the Commission's order of November 14, which contained the following statement:

Dixie Carriers, Inc. v. *United States of America*, Civil Action No. CA-9544, U. S. D. C. S. D. of Texas, Houston Division; *Long Island Railroad Co.* v. *United States of America*, Civil Action No. 16321, U. S. D. C. E. D. N. Y. The first suit, arising in the Fifth Circuit as did the instant case, was argued on May 18, 1956. No opinion has come down at this writing. On the other hand, the three-judge court in the *Long Island* case rendered its opinion (as yet unreported) on May 9, 1956. Circuit Judge Swan dissenting, the court followed the decision below in setting aside the Commission order under review.

390489—56——3

> *It further appearing,* That consideration has been given to petitions of the respondents requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor:

The District Court held that the last quoted statement was legally insufficient to support a vacation of the prior suspension.

At the outset, it should be noted that Section 15 (7) only requires the Commission to state reasons when it suspends rates; it does not require reasons when the Commission refuses to suspend or vacates a previous suspension.[11] Nevertheless, in the instant case, the District Court concluded that a more detailed statement of reasons was necessary.

In so holding, the court placed heavy reliance upon Section 8 (b) of the Administrative Procedure Act, which requires full and formal findings of fact and conclusions of law. However, Section 8 applies, by its express terms, only "In cases in which a hearing is required to be conducted in conformity with section 7" of the Administrative Procedure Act. And this Court has recently so held. *American Trucking Assns.* v. *United States,* 344 U. S. 298, 319–320. Since the Interstate Commerce Act does not require a hear-

[11] That a vacation of a prior suspension order may often be the equivalent of an initial refusal to suspend, is suggested by the chronology of this case. Here, the proposed rates were to become effective on September 24; the Board of Suspension refused to suspend on September 22; on appeal, Division 2 suspended the rates on September 23. It seems likely, in this and many other cases with a similar chronology, that the Division has opportunity to make a considered judgment only after its initial action to suspend.

ing in suspension cases—and certainly not "a hearing * * * in conformity with section 7," the requirements of Section 8 (b) of the Administrative Procedure Act are wholly inapplicable here.

The court below also relied on "the general law concerning the sufficiency of Commission action." 138 F. Supp. at 419. According to the court, "administrative agencies must, in terms beyond the statutory rubric, reveal the basis for their action by which to judge whether it has met the elemental standards of our system and statutory requirements." 138 F. Supp. at 417. But this proposition, although of course true as applied to formal proceedings, rests on the assumption that the challenged administrative action is subject to judicial review; if there is no judicial review, obviously there is no need to make findings to facilitate judicial review. And, as we have argued *supra*, the Commission order challenged in this case is not subject to judicial review. In this regard, it is significant that each of the decisions cited in the opinion below (138 F. Supp. at 417) as to "the general law concerning the sufficiency of Commission action" involved formal proceedings in which the requirement of making findings was unquestioned and the issue was instead the adequacy of those findings. *E. g., State of Florida* v. *United States, et al.*, 282 U. S. 194; *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80.

Practical considerations further illustrate the error in this aspect of the decision below. The holding of the District Court, that the Commission's suspension actions must be accompanied by a statement of

reasons in the nature of findings, would impair seriously the effectiveness of the suspension procedure. Applied to 5,000 suspension proceedings annually, it would create a heavy burden in the drafting of such reasons or findings, a burden entirely out of proportion to the tentative character of the Commission's decisions in suspension matters. It is entirely possible that the imposition of such a burden in the limited time available for suspension action would force the Commission to make a more sparing use of the suspension power. See *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, 689.

3. The decision below establishes the further precedent of invalidating rates which have already gone into effect and requiring the observance of rates which have been previously cancelled. After denying the temporary restraining order sought by the appellees and thus permitting the new rate schedules to go into effect,[12] the District Court enjoined their continued operation even while the Commission was investigating their lawfulness under Section 15 (1) of the Interstate Commerce Act.

In essence, the District Court undertook the making of rates which has been recognized universally as being beyond the scope of judicial power. *Peik* v. *Chicago N. W. R. Co.*, 94 U. S. 164; *Reagan* v. *Farmers' Loan & T. Co.*, 154 U. S. 362; *Simpson* v. *Shepard* (Min-

[12] The appellees were aware of this problem. In their complaint, in connection with their unsuccessful request for a temporary restraining order, they alleged: "Once the schedule becomes effective there is considerable doubt whether even a subsequent setting aside of the Commission's order could, in law, have the effect of cancelling the schedules."

nesota Rate Cases), 230 U. S. 352; *Louisville & N. R. Co.* v. *Garrett,* 231 U. S. 298; *Loomis* v. *Lehigh Valley R. Co.,* 240 U. S. 43; *Terminal R. Assn.* v. *United States,* 266 U. S. 17; *Atchison, T. & S. F. Ry. Co.* v. *United States,* 232 U. S. 199, 221; cf. *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 144. Indeed, the court assumed a power that not even the Commission, the agency charged by Congress with the function of rate regulation, possesses—namely, the power to suspend rates after they had gone into effect but prior to a final decision on their lawfulness. If the decision below is permitted to stand, none of the thousands of carrier made rates which become effective each year following the Commission's refusal to suspend could be relied upon as legal charges until they had been judicially tested or until the expiration of the seven month suspension period.

The instant case well illustrates one of the dangers implicit in such a far-reaching doctrine. The District Court's judgment, entered January 24, 1956, sets aside the Commission's order of November 14, 1955, as "void ab initio". The result of this judgment is that for over nine weeks the intervening railroads have been collecting freight charges below the "legal" rate and that these railroads are now obligated under the Elkins Act, 49 U. S. C. 41 *et seq.,* to collect from their shippers the undercharges—that is, the difference between the charges actually paid and the higher rate previously in force—even though the Commission has never determined that the rates are unlawful. Whether the court had such jurisdiction is, we submit, a question which should be determined by this Court.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

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JULY 1956.

APPENDIXES

Appendix A

In the District Court of the United States for the Northern District of Texas, Dallas Division

Civil Action No. 6289

Amarillo-Borger Express, Inc., et al.

v.

United States of America

Before Brown, Circuit Judge, Atwell and Estes, District Judges

Brown, *Circuit Judge:*

This is another skirmish in the running battle over freight rates for transportation of carbon black from the Southwestern area to the industrial area in the East. The precise question presented is whether the Interstate Commerce Commission's action in vacating a prior suspension of proposed rail rates was proper and, preliminary to that, whether such Commission act is reviewable at all.[1] We hold that it is, and that the action was improper.

Carbon black is an important product of natural gas. Consequently, the principal production is in that portion of United States known in the traffic world as the Southwestern area. With extensive

[1] The complaint filed by interested Motor Carriers is for review by statutory three-judge court, 28 U. S. C. A. 1336, 1398, 2284, 2321 to 2325.

natural gas activities, Texas is a leading producer. The principal consumers are the manufacturers of rubber goods, primarily automobile tires, one of the chief and typical consuming points being Akron, Ohio. Transportation of carbon black by Motor Carriers is important to them as it furnishes a substantial tonnage for movement from the Southwest to the Ohio area which would otherwise be a dead haul since the predominant long haul Motor Carrier traffic moves *to* the Southwest. Until 1954, the rates were apparently competitive between rail and motor carriers.

The controversy, of which the present action is the latest part, originated in 1954. Translating the problem from abstract concepts into a typical illustration of the operation of the rates better demonstrates the significance of the actions taken and its vital importance in the economic existence of complainants. A typical illustration on which there is no dispute is the rate from points in the Texas Panhandle to Akron, Ohio. The pre-1954 rate for motor carrier was $1.53 per cwt; the rail rate was approximately $1.56 cwt. The slight difference, we are told, was in the operation of the blanket general increases.

In the early part of 1954, the rail carriers published certain schedules which established a substantial differential in their favor below motor carrier rates. The rail rate which had been $1.56 was reduced to $1.4785 cwt. The differential was then 5.15 cents below the motor carrier rate ($1.53). These schedules were permitted to become effective.

Thereafter, the motor carriers (which included the complainants here) filed schedules which, they asserted, were designed to meet this new scale and restore the competitive parity which had formerly existed. However, upon the filing of these schedules,

the competing rail carriers petitioned the Interstate Commerce Commission to suspend them, and this was done. The Commission ordered an investigation of these proposed motor carrier rates which it had suspended. This hearing was held in July 1954. The Trial Examiner, upon hearing and consideration, filed a report in which he recommended that the Commission find that the motor carriers' reduction in rates was justified and lawful. The rail carriers, as permitted under the practice of the Commission, filed Exceptions to the Report, and the matter is now pending undecided before the Commission. There is no indication before us concerning the reasons for this delay or the time in which final decision is likely.[2] The seven months' statutory period, 49 U. S. C. A. 15 (7), for suspension expired, but in accordance with the administrative practice followed generally, the period of suspension was extended until the matter was finally determined,[3] the effect of which is to freeze

[2] After decision by the appropriate Division, the rules permit a petition for rehearing and consideration before the full Commission, a procedure which, with further briefs, inevitably involves many months' time; and, upon completion of Commission review, interested parties can precipitate judicial review. If the past is any guide, it is improbable that a final decision would be achieved under a year.

[3] Apparently out of recognition of the physical impossibility of the Commission rendering a decision in these complex matters without adequate hearings, opportunity for preparation of constructive briefs, the submission and argument of interested parties and time for consideration and decision—a process which can seldom be done in seven months—it appears to be the universal practice of all regulated carriers concerned to agree to the continuation of a suspension once issued. On argument here, counsel for both rail and motor carriers assumed that this time-honored practice would be followed if, by our action, the prior suspension order was reinstated. Consequently, the matter goes way beyond April 23, 1956.

the motor carrier rates at their pre-1954 level ($1.53 cwt).

Notwithstanding the fact that the rail carriers through this situation were enjoying a 5.15 cents differential, they filed tariffs to become effective September 24, 1955, to establish a new schedule of rates substantially below their earlier reduced scale. For the typical movement, the proposed rate was $1.33 compared to the rail's 1954 rate of $1.4785, and the motor carriers' frozen rate of $1.53.

Through their authorized freight bureaus, the motor carriers, including Complainants, filed petitions with the Commission requesting the Commission to suspend the proposed schedules because they were unlawful, would result in rates and charges which would be unjust and unreasonable and constitute unfair and destructive competition contrary to the National Transportation Policy. Replies were filed by interested parties, including the railroads. In a conference hearing September 21, 1955, the Suspension Board [4] declined to suspend. On September 23, 1955, Division 2, acting as an Appellate Division on suspension matters, issued its order suspending the proposed schedules and directing an investigation. The significant portion of this order [5] states:

> *And it further appearing*, That upon consideration of the said schedules and protests thereto there is reason to believe that they

[4] A board of Commission employees established for the purpose of handling suspension matters pursuant to 49 U. S. C. A. 17 (2), § 7.3, 20 FR 5031-5035, July 14, 1955.

[5] Investigation and suspension docket No. 6476 Carbon Black—Southwest to U. S. A. & Canada

"*It appearing*, That there have been filed with the Interstate Commerce Commission tariff schedules setting forth new reduced rates and charges, and new rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign

would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy; and good cause appearing therefor:

Petitions for reconsideration by rail carriers and certain shippers were filed, and on November 14, 1955, Division 2 vacated [6] its prior order of suspension.

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commerce, to become effective September 24, 1955, and later, designated as follows:"

[Railroad tariffs are described]

[then follows paragraph quoted in text above]

"*It is ordered*, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges and regulations contained in such schedules, with a view to making such findings and orders in the premise as the facts and circumstances shall warrant.

"*It is further ordered*, That the operation of the said schedules be and it hereby is suspended, and that the use thereof on interstate and foreign commerce be deferred to and including April 23, 1956, unless otherwise ordered by this Commission."

[6] "*It appearing*, That by an order dated September 23, 1955, the Commission, Division 2, acting as an appellate division, entered upon an investigation concerning the lawfulness of certain rates and charges and the regulations and practices stated in schedules designated therein, and suspended the operation of the said schedules to and including April 23, 1956;

"*It further appearing*, That consideration has been given to petitions of the respondents requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor:

"*It is ordered*, That the said order of September 23, 1955, be, and the same is hereby, vacated and set aside as of November 24, 1955, insofar as it suspended the operation of the schedules designated therein, but that the proceeding of investigation of said schedules shall continue in full force and effect."

The only "finding" by the Commission[7] was:

> *It further appearing,* That consideration has been given to petitions of the respondents requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor:

The result of these administrative proceedings is that motor carriers because of the railroads' successful petitions for suspension are bound by their pre-1954 rates, while the railroads compete for this traffic at drastically reduced rates during the many months ahead when the lawfulness of these rail rates is under review.[8]

By motion and defense the Commission, the United States, and intervening railroads assert that the matter is beyond the power of review by this court because the granting or denial of a suspension is a matter committed wholly to the Interstate Commerce Commission; that complainants have failed to exhaust their administrative remedies and, in any case, even though the order vacating suspension was illegal,[9] both court and Commission are powerless to sus-

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[7] By Order November 23, 1955, the full Commission denied the petition of motor carriers to waive their rule according administrative finality to suspension orders of Division 2, to stay the effectiveness of the order of November 14 and assign the whole matter for argument before the full Commission. The action under review, therefore, is that of the Commission, and not just a Division thereof.

[8] While the order of suspension September 23, 1955, was still effective, the Commission November 1, 1955, set the hearings on the investigation phase November 29, 1955, at Dallas. November 16, two days after the vacation of suspension, the Commission postponed indefinitely the hearings scheduled for November 29. The hearings are now scheduled to commence February 2, 1956.

[9] The suggestion was also made that complainants showed no irreparable injury entitling them to an injunction. Since, as competing carriers, they are clearly an aggrieved party entitled to

pend the rail schedules which have thus become effective or reinstate the prior rates.

As the economic consequence of the Commission's action, if wrong, is so adverse we must be certain that the administrative processes which produce this result comply with the spirit and the rules of law.

In this approach, we do not, as the defendants fear we must, substitute ourselves for the Commission or pass judgment, at this time, upon the intrinsic

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complain of Commission action, *Alton R. Co.* v. *United States*, 315 U. S. 15, 86 L. Ed. 586; *Chicago St. P. M. & O. Ry. Co.* v. *United States* (D. C. Minn.), 50 Fed. Supp. 249, affd. 322 U. S. 1, 88 L. Ed. 1093; cf. *F. C. C.* v. *Sanders Brothers Radio Station*, 309 U. S. 470, 84 L. Ed. 869; *Interstate Com. Com.* v. *Oregon-Wash. R. Co.*, 288 U. S. 14, 25, 77 L. Ed. 588, 596; *American President Lines* v. *Federal Maritime Board* (D. C. D. C.), 112 Fed. Supp. 346, 349, it is our view that if, as we hold, the action is found to be "(1) not in accordance with law * * * (4) without observance of procedure required by law", § 1009 (e), Administrative Procedure Act, 5 U. S. C. A. 1001 et seq, it is the duty of the court to set it aside and a complainant who qualifies as a statutory "aggrieved person" need not further show that he will suffer a specific dollar loss for unlawful action of a governmental agency. In any case, by suggestion of the Court on hearing and agreement of counsel, affidavits and counteraffidavits were filed in lieu of oral testimony upon which we find, as a fact, that the movement of carbon black from the Southwestern area to the Eastern part of the United States is an important, vital part of complainants' business, producing substantial revenues which, in all likelihood will be substantially reduced in view of the widespread differentials in favor of railroad transportation. Complainants had already received letters and similar inquiries from shippers and similar trade representatives inquiring what steps were to be taken to meet the rail competition after vacation of the suspension order. The rail's action in successfully obtaining suspension of the motor carriers' 1954 schedules manifests the carrier approach to the dominant significance of the differential in rates as the principal basis for traffic diversion. And, of course, by its order of September 23, the Commission found the probability of destructive competition.

merits of the question of the lawfulness or unlawfulness of the rail tariffs or the ultimate granting or denial of a suspension. Ours is the important, but much narrower, inquiry: under the circumstances presented here, was the action of the Commission in vacating the suspension lawful and proper?[10]

Of course, at the bottom, is the fact that a suspension order was issued on a finding of dominant significance. The order stated in categorical terms that, upon the record then before the Suspension Board and Division 2, on appeal, there was, "reason to believe that they [rates] would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the * * * act and con-

[10] The action we review is not the failure of the Commission to suspend, nor are we confronted with the question of reviewability, or extent thereof, of Commission action, taken with proper regard to substantive and procedural requirements, declining to suspend proposed rates, such as that involved in the cases pressed on us so heavily by defendants: *Carlsen* v. *United States* (S. D. N. Y.) (three-judge), 107 Fed. Supp. 398; *Algoma Coal & Coke Company et al.* v. *United States* (D. C. Va., 1935) (three-judge), 11 Fed. Supp. 487; *M. C. Kiser Co.* v. *Central of Georgia Railway* (D. C. Ga.), 236 Fed. 573, affd. 5 Cir., 239 Fed. 718; *Manhattan Transit Co., Inc.* v. *United States* (D. C. Mass.) (three-Judge), 24 Fed. Supp. 174; *National Water Carriers Association* v. *United States* (S. D. N. Y.) (three-Judge), 126 Fed. Supp. 87; *Merchants Truckmen's Bureau* v. *United States* (S. D. N. Y.), 16 Fed. Supp. 998. In some, it must be recognized, language so sweeping is used that, if followed literally, would put suspension actions by the Commission beyond the pale, a concept wholly out of harmony with the moving spirit of the Administrative Procedure Act and the underlying force of Judge Hutcheson's opinion, *Ferguson-Steere Motor Co.* v. *United States* (N. D. Tex. 1954) (three-Judge), 126 Fed. Supp. 588, 591, that such orders, as other Commission action, are subject to judicial scrutiny to determine legality and whether administrative discretion was exercised at all, and if so, whether abused.

stitute unfair and destructive competitive practices in contravention of the National Transportation Policy." These are plain, emphatic words of strong meaning. Of course, neither the United States nor the Commission can assert that such virile language must be disregarded as routine, stereotyped bureaucratic formulae for the Commission was under a dual [11] statutory obligation adequately to state its reasons for the suspension order. Since all reviewing courts are admonished, and we are here through specific citation in the briefs before us, to accord to Commission action a presumption of legality, *United States* v. *Chemical Foundation,* 272 U. S. 1, 14, 15; *Baltimore and Ohio R. Co.* v. *United States,* 298 U. S.

[11] The first is in § 15 (7) of the Interstate Commerce Act, 49 U. S. C. A. 15 (7):

"Whenever there shall be filed with tht commission any schedule stating a new * * *, fare, or charge, or any new * * *, or any new * * * regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, * * *, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, * * *, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a *statement in writing of its reasons* for such suspension, may from time to time *suspend* the operation of such schedule and defer the use of such rate, fare, * * *, but not for a longer period than seven months beyond the time when it would otherwise go into effect; * * * At any hearing involving a change in a rate, fare, * * *, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, * * * is just and reasonable, * * *." [Emphasis supplied.]

The second is in the Administrative Procedure Act, § 8, 49 U. S. C. A. 1007:

"* * * All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, *as well as the reasons or basis thereof*, upon all the material issues of fact, law or discretion presented on the record; * * *." [Emphasis supplied.]

349, 358, 360; *Federal Power Commission* v. *Hope National Gas Co.*, 320 U. S. 591, 602, we think that all parties were entitled to take his for its face value as a deliberate, responsible, articulate finding that the proposed rates would produce these results which, contravening the National Transportation Policy, would be destructive of a sound system of national transport, Act September 18, 1940, c. 722, Title I, Section 1, 54 Stat. 899.

But these findings, decisive and significant in nature, made in scrupulous regard for statutory mandate were, by the order of vacation, swept away without the slightest indication of the existence of facts, an adequate description of them, or even the barest statement of reasons underlying the Commission's change of heart. The propriety of its action, on the external record, must be tested under the simple, brief phrase, "and good cause appearing therefor." [12]

If the cryptic phrase "good cause appearing" is a sufficient indication of action, it will be a self-generating bar to any review since, "the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based," *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, 87 L. Ed. 626. It is precisely because the scope of judicial review is so narrowly limited, that administrative agencies must, in terms beyond the statutory rubric, reveal the basis for their action by which to judge

[12] The second and significant paragraph of the order read: "It further appearing, that consideration has been given to the petitions of the respondents (railroads and some shippers) requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor;" Obviously the fact that railroads requested vacation of the order would not be a good ground; nor, as contended by Complainants, do we think that the Commission meant that.

whether it has met the elemental standards of our system and statutory requirements. A threshold decision by reviewing court therefore is whether there is a "lack of the basic or essential findings required to support the Commission's order," *State of Florida* v. *United States,* 282 U. S. 194, 215, 75 L. Ed. 291; *United States* v. *Baltimore & Ohio R. Co.,* 293 U. S 454, 465, 79 L. Ed. 587; *Alabama G. S. R. Co.* v. *United States,* 340 U. S. 216, 224, 95 L. Ed. 25; *Cantlay & Tanzola* v. *United States* (S. D. Calif.) (three-Judge), 115 Fed. Supp. 72; *North Carolina* v. *United States,* 325 U. S. 507, 89 L. Ed. 1760; *Atlanta and St. Andrews Bay Railway Co.* v. *United States,* 104 Fed. Supp. 193; *Pacific Inland Tariff Bureau* v. *United States,* 129 Fed. Supp. 472.

Moreover, this requirement has now been made explicit by the Administrative Procedure Act, 5 U. S. C. A. 1007 (b), which requires a statement of findings and conclusions in their ultimate legal form "as well as the reasons or basis therefor." Conceding, as they must, that under *Riss and Co., Inc.* v. *United States,* 341 U. S. 907, 95 L. Ed. 1345, the Commission is subject to the Administrative Procedure Act, the United States and the Commission seek to escape its impact in suspension matters on the theory that, since suspension is a matter committed to the discretion of the Commission, it is specifically excepted under Section 1009:

> § 1009. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) * * * any person * * * adversely affected or aggrieved * * *, shall be entitled to judicial review thereof.

Starting with *Board of Railroad Commissioners of North Dakota* v. *Great Northern Railway Co.,* 281

U. S. 412, which, describing the statutory background of present Section 15 (7) concerning suspensions, states, "This power of suspension was entrusted to the Commision only", and relying heavily on *Carlsen, Algoma Coal, Kiser, Manhattan Transit Co.,* and others cited footnote 10, supra, holding that a refusal to suspend is not subject to review, defendants argue that this administrative judgment exempts the whole field from the requirements of the Administrative Procedure Act.

A proper regard for the whole reach of the Administrative Procedure Act and its long legislative history will not support an argument which would automatically remove from its protection substantially every administrative agency to whom was entrusted judgment and discretion in its administrative decision. This language was used to assure that judicial review would not be contrived where it was plain that none was intended, and where the action under inquiry was one wholly within the right of the agency to grant or refuse, allow or deny, with no statutory or similar standard established upon which to base its action. But the exercise of discretion, the making of judgments, and the issuance of sanctions, 5 U. S. C. A. 1001 (f), upon the basis of administrative expertise, are precisely the matters which Congress in this important legislation intended should be under, not exempt from, the Administrative Procedure Act.[11]

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[11] The following references to legislative history are found (on pages indicated) in Senate Document No. 258, 79th Congress, Second Session, Administrative Procedure Act, Legislative History:

Report of the Committee on the Judiciary (Report No. 752) at page 212:

"SEC. 10. (now § 1009) Judicial Review—*Section 10 on judicial review does not apply in any situation so far as there are involved*

Consequently, we are of the clear opinion that whatever the ultimate scope of judicial review might be on a suspension matter, the Commission is obliged in all stages to respect the requirements, the letter and the spirit of the Administrative Procedure Act. Since both it and the general law concerning the sufficiency of Commission action require an adequate statement of the underlying reasons for the action, we

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matters with respect to which statutes preclude judicial review or agency action is by law committed to agency discretion.

"Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.

"The basic exception of matters committed to agency discretion would apply even if not stated at the outset. If, for example, statutes are drawn in such broad terms that in a given case there is no law to apply, courts of course have no statutory question to review. That situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administrative powers. However, where statutory standards, definitions, or other grants of power deny or require action in given situations or confine an agency within limits as required by the Constitution, then the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record."

Committee on the Judiciary, House of Representatives (House Report No. 1980), page 275, 276:

"Section 10. * * * (heading same as Senate Committee Report)

"This section requires adequate, fair, effective, complete, and just determination of the rights of any person in properly invoked proceedings.

"* * * (Here follows first paragraph of Senate Committee Report quoted above) The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its

think it evident that the order of vacation did not satisfy these requirements. This order vacating the prior one is a part of, and must be read with, it. All that it says is that "good cause appearing," the prior action is rescinded. If it is read as though it were meant to be a repeal, a withdrawal, and rescission of the findings that the rates would (1) be unjust, (2) unreasonable, (3) in violation of the Act, (4) constitute unfair destructive competition, and (5) contravene the National Transportation Policy, the record would yet be inadequate. We do not think the Commission can make serious findings of this

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face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.

"Matters of discretion are necessarily exempted from the section, since otherwise courts would in effect supersede agency functioning. But that does not mean that questions of law properly presented are withdrawn from reviewing courts. Where laws are so broadly drawn that agencies have large discretion, the situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administrative powers. However, where statutory standards, definitions, or other grants of power deny or require action in given situations or confine an agency within limits as required by the Constitution, then the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record. In any case the existence of discretion does not prevent a person from bringing a review action but merely prevents him *pro tanto* from prevailing therein."

And in debates in the Senate (Congressional Record March 12, May 24, 25, 27, 1946) during presentation by its distinguished sponsor Senator McCarran, page 310, 311:

"Mr. McCarran. I yield.

"Mr. Donnell. I should like to ask the distinguished Senator a question. Section 10 (now 5 U. S. C. A. 1009) of the bill recites in part that—

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

nature and then, without more, announce that they no longer exist. The basic facts, the underlying reasons for that action, would require, as a minimum, some discussion of the factors leading the Commission intelligently and as a matter of deliberative judgment in good faith to contrary conclusions. If, as may be suggested by the order of November 14, the Commission felt that there was information contained in the petitions to vacate which justified or required the change in its conclusions, the Commission could easily have given sufficient elaboration of the file record to enable parties, counsel, and reviewing tribunals to de-

"(a) Right of review: Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"It has occurred to me the contention might be made by someone in undertaking to analyze this measure that in any case in which discretion is committed to an agency, there can be no judicial review of action taken by the agency. The point to which I request the Senator to direct his attention is this: In a case in which a person interested asserts that, although the agency does have a discretion vested in it by law, nevertheless there has been abuse of that discretion, is there any intention on the part of the framers of this bill to preclude a person who claims abuse of discretion from the right to have judicial review of the action so taken by the agency?

"Mr. McCarran. Mr. President, let me say, in answer to the able Senator that the thought uppermost in presenting this bill is that where an agency without authority or by caprice makes a decision, then it is subject to review.

* * * * *

"Mr. Donnell. But the mere fact that a statute may vest discretion in an agency is not intended, by this bill, to preclude a party in interest from having a review in the event he claims there has been an abuse of that discretion. Is that correct?

"Mr. McCarran. It must not be an arbitrary discretion. It must be a judicial discretion; it must be a discretion based on sound reasoning."

termine whether this was the act of genuine judgment, deliberate discretion and reasonable decision, or whether it was hastly, ill considered, precipitous action with no substantial basis for it.

What we have said is certainly correct if it is assumed that the Commission intended its cryptic phrase "good cause appearing" to wipe away all of its prior fact conclusions. It is all the more so if, as seems likely, the Commission intended that the balance of its order of September 23 calling for investigation of the rates to determine their lawfulness should remain in effect. In expressed terms the only change made by the subsequent order was to vacate the former so far as concerned suspension alone. It literally left in force the findings of unlawfulness, destructive competition, and then, without more than the magic phrase "good cause appearing", determined that what on September 23 led them to suspend now led them to unsuspend. The Commission may, as any other body, have the right to change its mind, but its action must demonstrate the "reasons or basis therefor."

We are equally of the clear opinion that Complainants have the right to challenge and the court has the power to nullify action so illegal and having such immediate and irreparable consequences. Unless the rates are suspended, the Complainants have no protection against this competition until such time as the Commission's decision has become final on the basic investigation or on a complaint under Section 13, 49 U. S. C. A. 13. But under the statutory scheme of Section 15 (7), rates can be suspended only within thirty days and then not for a time beyond seven months. If, as we hold it was, the act of the Commission in vacating the prior suspension was illegal, the only possible way for Complainants to secure the

benefit of that suspension or to eradicate the devastating consequences of an unlawful vacation of it, was by an immediate appeal and injunction. In this sense it was no routine, administrative interim action but was truly final in form and effect; once gone, it was irretrievable. There was thus no further administrative machinery or procedure available—much less to be exhausted. *Utah Fuel Company* v. *National Bituminous Coal Commission,* 306 U. S. 56; *Isbrandtsen Co.* v. *United States,* 211 F. 2d 51; see also opinion of Mr. Justice Douglas, as Circuit Justice, *Standard* v. *Olson,* May 22, 1954, 98 L. Ed. 1151. If the Commission act is allowed to stand, the right to a suspension is forever gone until, months or years later, a decision of the Commission on basic unlawfulness or unreasonableness of the rates becomes final and effective. Complainants may succeed in the investigation proceeding soon to commence, but grinding, as it must, slowly through inevitable judicial review, the motor carriers will have no relief for the traffic which they have lost, diverted to rails, during this long period of time.[14] We do not mean to say that Complainants are entitled to a suspension; but when one has validly issued it can be rescinded only by lawful methods.

Nor can this situation which makes judicial relief from administrative error imperative be turned, as defendants attempt, into the argument that such relief should be denied because the Commission is now powerless to suspend rates once they are in effect. We can assume that by virtue of Sections

[14] The provision in § 15 (7), footnote 11, supra, for protection of shippers after the expiration of the seven months' statutory period of suspension is of no help to competing carriers adversely affected since this relates only to "proposed *increased*" rates, and the requirement to keep accurate records and make refunds of excess payments received in the interim is limited to "the persons in whose behalf such amounts were paid."

6 (3), 15 (1) and 15 (7) of the Act, 49 U. S. C. A. 6 (3), 15 (1), 15 (7), that suspension must be ordered within thirty days of the initial filing, and where once allowed to become effective from the absence of a suspension order, the Commission cannot thereafter suspend. *Skinner and Eddy Corp.* v. *United States*, 249 U. S. 557. But no such thing occurred here. Here, before the rates became effective, a valid suspension order was issued. On the record this suspension order was vacated, but, for the reasons we have detailed, this action was contrary to law. The power of the Commission to continue a suspension validly made (until validly set aside) cannot be altered by illegal action, nor can the carrier (here the rails) upon whose petition the illegal action was taken, assert that their rights to put into effect tariff rates shall be the same as though no such administrative action had taken place. Once the order of November 14 is expunged, the matter is remitted to the situation existing immediately prior to its entry: The rates were then under valid suspension. The power of the Commission does not exhaust itself through its own errors. If it were so, the law would indeed be a straight jacket.

It follows, therefore, that the order of November 14, 1955, vacating the suspension must be declared void, an injunction against its enforcement issued, and the proceedings remanded to the Commission for further and not inconsistent proceedings as though the order had never been made. To effectuate the holding herein, the injunction will forbid the use or application of tariff [15] rates and schedules which be-

[15] Subsequent to November 14, 1955, the railroads filed Supplement 170, published as a new tariff schedule, effective December 31, 1955, but which is, they state, the equivalent of, and restores, the schedules suspended September 23.

came, or were allowed to become, effective by reason of the vacation of the prior suspension order of September 23, 1955, until such time as the order of September 23, 1955, shall have been rescinded or modified by lawful action of the Commission.

JUDGMENT FOR PLAINTIFF. REMANDED TO THE COMMISSION.

APPENDIX B

In the District Court of the United States for the northern district of Texas, Dallas division

Civil Action No. 6289

AMARILLO-BORGER EXPRESS, INC., ET AL.

v.

UNITED STATES OF AMERICA

JUDGMENT

BE IT REMEMBERED, that on December 12, 1955, in the above entitled and numbered cause wherein AMARILLO-BORGER EXPRESS, INC.; BEST MOTOR FREIGHT; KNAUS TRUCK LINE, INC.; LEEWAY MOTOR FREIGHT, INC.; MERCHANT'S FAST MOTOR LINES, INC.; STRICKLAND TRANSPORTATION COMPANY, INC.; SUNSET MOTOR LINES, INC.; and YELLOW TRANSIT FREIGHT LINES, INC., are Complainants; the UNITED STATES OF AMERICA is Defendant; and the Interstate Commerce Commission is intervenor on behalf of the Defendant; and the Southwestern Railroads (a group of Railroads

whose names are listed in Appendix "A" of this judgment, are likewise intervenors on behalf of the Defendant, the trial upon its merits came on regularly to be heard before a Court of three judges convened pursuant to law. All parties appeared by counsel and the merits of the cause were fully presented, and the matter was submitted to the Court.

Thereafter, and on January 23, 1956, the Court delivered and filed its unanimous opinion to the effect that the assailed order is void and that the Complainants are entitled to injunctive relief as specified in the said opinion, to which opinion reference is here made.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the order of the Interstate Commerce Commission entered on November 14, 1955, and reading as follows:

> "Order. At a Session of the Interstate Commerce Commisison, Division 2, acting as an appellate division, held at its office in Washington, D. C., on the 14th day of November, A. D. 1955. Investigation and Suspension Docket No. 6476. Carbon Black-Southwest to U. S. A. & Canada. *It appearing,* That by an order dated September 23, 1955, the Commission, Division 2, acting as an appellate division, entered upon an investigation concerning the lawfulness of certain rates and charges and the regulations and practices stated in schedules designated therein, and suspended the operation of the said schedules to and including April 23, 1956; *It further appearing,* That consideration has been given to petitions of the respondents requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor; *It*

is ordered, That the said order of September 23, 1955, be, and the same is hereby, vacated and set aside as of November 24, 1955, insofar as it suspended the operation of the schedules designated therein, but that the proceeding of investigation of said schedules shall continue in full force and effect. By the Commission, Division 2, acting as an appellate division. HAROLD D. McCOY, *Secretary.* [SEAL]"

be, and the same is hereby, declared to be void, ab initio, said order is hereby set aside and its enforcement is hereby restrained and enjoined.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the suspension proceedings out of which the enjoined order arose be, and the same are hereby, remanded to the Interstate Commerce Commission for further and not inconsistent proceedings as though the order of November 14, 1955, had never been entered.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the use in interstate or foreign commerce of Supplement 170 to Southwestern Lines Freight Tariff No. 111–J, ICC No. 3744 (Agent F. C. Kratzmeir) and any and all other Railroad tariff rates and schedules which became or were allowed to become effective by reason of the order of November 14, 1955, (to the extent that they publish rates suspended by the order of September 23, 1955) be and the same is hereby prohibited until such time as the order of September 23, 1955, issued by the Interstate Commerce Commission in its investigation and suspension Docket No. 6476 shall have been rescinded or modified by lawful action of the Interstate Commerce Commission.

RENDERED AND ENTERED in open Court this 24th day of January 1956.

s/ WM. H. ATWELL,
United States District Judge.

Approved for entry:

s/ RALPH W. CURRIE,
Attorney for Complaints.

s/ JOHN C. FORD,
Attorney for United States of America.

s/ BERNARD ENGLISH,
Attorney for Interstate Commerce Commission.

s/ WM. R. MCDOWELL,
Attorney for Southwestern Railroads.

APPENDIX A [to Judgment]

The Southwestern Railroads are as follows:

Arkansas & Louisiana Missouri Railway Company.
The Atchison, Topeka and Santa Fe Railway Company.
Gulf, Colorado and Santa Fe Railway Company.
Panhandle and Santa Fe Railway Company.
Chicago, Rock Island and Pacific Railroad Company.
The Colorado and Southern Railway Company.
Fort Worth and Denver City Railway Company.
Illinois Central Railroad Company.
The Kansas City Southern Railway Company.
Louisiana & Arkansas Railway Company.
The Arkansas Western Railway Company.
Fort Smith and Van Buren Railway Company.
Midland Valley Railroad Company.
Kansas, Oklahoma & Gulf Railway Company.

Oklahoma City-Ada-Atoka Railway Company.
Missouri-Kansas-Texas Railroad Company.
Missouri-Kansas-Texas Railroad Company of Texas.
Beaver, Meade and Englewood Railroad Company.
Missouri Pacific Railroad Company
(Guy A. Thompson, Trustee).
Asherton and Gulf Railway Company
(Guy A. Thompson, Trustee).
Asphalt Belt Railway Company
(Guy A. Thompson, Trustee).
The Beaumont, Sour Lake & Western Railway Company
(Guy A. Thompson, Trustee).
Doniphan, Kensett & Searcy Railway.
Houston and Brazos Valley Railroad Company
(Guy A. Thompson, Trustee).
International-Great Northern Railroad Company
(Guy A. Thompson, Trustee).
Natches & Southern Railway Company
(Guy A. Thompson, Trustee).
New Iberia & Northern Railroad Company
(Guy A. Thompson, Trustee).
New Orleans and Lower Coast Railroad Company.
New Orleans, Texas & Mexico Railway Company
(Guy A. Thompson, Trustee).
The Orange & Northwestern Railroad Company.
(Guy A. Thompson, Trustee).
Rio Grande City Railway Company
(Guy A. Thompson, Trustee).
The St. Louis, Brownsville and Mexico Railway Company.
(Guy A. Thompson, Trustee).
San Antonio Southern Railway Company
(Guy A. Thompson, Trustee).

San Antonio, Uvalde & Gulf Railroad Company.
(Guy A. Thompson, Trustee).
San Benito and Rio Grande Valley Railway Company.
(Guy A. Thompson, Trustee).
Sugar Land Railway Company
(Guy A. Thompson, Trustee).
St. Louis Southwestern Railway Company.
St. Louis-San Francisco Railway Company.
St. Louis, San Francisco and Texas Railway Company.
Quanah, Acme & Pacific Railway Company.
Southern Pacific Company.
Texas and New Orleans Railroad Company.
The Texas and Pacific Railway Company.
Abilene & Southern Railway Company.
The Denison and Pacific Suburban Railway Company.
Texas-New Mexico Railway Company.
Texas Short Line Railway Company.
The Weatherford, Mineral Wells and Northwestern Railway Company.
The Texas Mexican Railway Company.

Appendix C

Corrected Order

At a Session of the Interstate Commerce Commission, Division 2, held at its office in Washington, D. C., on the 23rd day of September, A. D., 1955

Investigation and Suspension Docket No. 6477

CARBON BLACK—SOUTHWEST TO COLORADO

It appearing, That there have been filed with the Interstate Commerce Commission tariff schedules set-

ting forth new reduced rates and charges and new rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce, to become effective September 24, 1955, designated as follows:

F. C. KRATZMIER, Agent:

SUPPLEMENTS 28 and 31 to I. C. C. 4136:

On pages 2 and 3 thereof, respectively, in ITEM 1270–B the reference to column "C" and on pages 2, 3 and 4 and 3, 4 and 5 thereof, respectively in Items 1280–B to 1336–B inclusive, the rates in the columns captioned "C";

And it further appearing, That upon consideration of the said schedules and protests thereto there is reason to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy; and good cause appearing therefor:

It is ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges and regulations contained in said schedules, with a view to making such findings and orders in the premise as the facts and circumstances shall warrant.

It is further ordered, That the operation of the said schedules be and it hereby is suspended, and that the use thereof on interstate and foreign commerce be deferred to and including April 23, 1956, unless otherwise ordered by this Commission.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters and

issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said schedules under the Interstate Commerce Act.

It is further ordered, That neither the schedules hereby suspended nor those sought to be altered thereby shall be changed until this proceeding has been disposed of or until the period of suspension has expired, unless otherwise ordered by the Commission.

And it is further ordered, That a copy of this order be filed with the schedules in the office of the Interstate Commerce Commission, and that copies hereof be forthwith served upon the carriers parties to the said schedules and that the said carriers be, and they are hereby, made respondents to this proceeding.

By the Commission, Division 2.

[SEAL] HAROLD D. MCCOY, *Secretary*.

APPENDIX D

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, DIVISION 2, acting as an appellate division, held at its office in Washington, D. C., on the 14th day of November, A. D. 1955

Investigation and Suspension Docket No. 6476

CARBON BLACK—SOUTHWEST TO U. S. A. & CANADA

It appearing, That by an order dated September 23, 1955, the Commission, Division 2, acting as an appellate division, entered upon an investigation concerning the lawfulness of certain rates and charges and the regulations and practices stated in schedules designated therein, and suspended the operation of the said schedules to and including April 23, 1956;

It further appearing, That consideration has been given to petitions of the respondents requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor:

It is ordered, That the said order of September 23, 1955, be, and the same is hereby, vacated and set aside as of November 24, 1955, insofar as it suspended the operation of the schedules designated therein, but that the proceeding of investigation of said schedules shall continue in full force and effect.

By the Commission, Division 2, acting as an appellate division.

[SEAL] HAROLD D. MCCOY, *Secretary.*

APPENDIX E

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1 *et seq.*, are as follows:

SEC. 6 (3)

No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided,* That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the re-

quirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further,* That the Commission is hereby authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges or classifications not changed if, in its judgment, not inconsistent with the public interest.

SEC. 13 (1)

That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the mat-

ters complained of in such manner and by such means as it shall deem proper.

SEC. 15 (7)

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate

account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

The pertinent provisions of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1 *et seq.*, are as follows:

SEC. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions)

shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

SEC. 10. * * *

* * * * *

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

FILED
JAN 23 1957
JOHN T. FEY, Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1956

No. 125

ARKANSAS & LOUISIANA MISSOURI RAILWAY COMPANY; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; GULF, COLORADO AND SANTA FE RAILWAY COMPANY, *et al.*,

Appellants,

v.

AMARILLO-BORGER EXPRESS, INC., *et al.*,

Appellees.

On Appeal from the United States District Court for the Northern District of Texas

---

BRIEF OF THE APPELLANTS

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INDEX

	Page
Opinion Below	1
Jurisdiction	1
Statutes Involved	2
Questions Presented	2
Statement	3
Summary of Argument	6
Argument	8
I. The Commission's Action in Vacating Suspension of the Proposed Rate Schedules, Pending a Hearing and Final Decision Into the Lawfulness, Was in Accord with Statutory Authority and Is Not Subject to Judicial Review	8
a. The Administrative Procedure Act Has Not Enlarged the Judicial Scope of Review of Suspension Proceedings	10
b. The Court Was Without Jurisdiction Because There Was No Reviewable Order Under the Doctrine of Administrative Finality	18
II. The Commission's Order Vacating Suspension of the Proposed Rate Schedules Is Not Required to be Supported by Findings	19
III. In Any Event the District Court Lacked Jurisdiction to Set Aside Rates Already in Effect Prior to a Final Commission Decision on Their Lawfulness	29
Conclusion	31
Appendix A	33
Appendix B	41
Appendix C	43

Citations

Cases

	Page
Algoma Coal & Coke Co. v. United States, 11 F. Supp. 487	9
Air Line Pilots Ass'n, Internat'l v. Civil Aeronautics Board, 215 F. 2d 122	24
American Trucking Assns. v. United States, 344 U. S. 298	23
Atchison, T. & S. F. Ry. Co. v. United States, 232 U. S. 199	21, 30
Atchison, T. & S. F. Ry. Co. v United States, 130 F. Supp. 76	10
Board of Commissioners v. Great Northern R. Co., 281 U. S. 412	9, 11
Carlsen v. United States, 107 F. Supp. 398	9
Cook-Cleland Catalina Airways v. Civil Aeronautics Board, 195 F. 2d 206	25
Director General v. The Viscose Company, 254 U. S. 498	18
Dixie Carrier, Inc. v. United States, 143 F. Supp. 844	16
Eastern Air Lines v. Civil Aeronautics Board, 185 F. 2d 426	25
Ewing v. Mytinger & Casselberry, 339 U. S. 594	27
Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134	30
Federal Power Commission v. Metropolitan Edison Co., 304 U. S. 375	18
Federal Power Commission v. Colorado Interstate Gas Co., 348 U. S. 492	19
Ferguson-Steere Motor Co. v. United States, 126 F. Supp. 588	9

Page

Florida v. United States, 281 U. S. 194 28

Geo. A. Rheman Company v. United States, 133 F. Supp. 668 25

Interstate Commerce Commission v. Inland Waterways Corp., 319 U. S. 671 ..... 16, 29

Kenny v. United States, 103 F. Supp. 971 25

Kiser (M. C.) Co. v. Central of Georgia Ry. Co., 236 Fed. 573, affirmed, 239 F. 718 9

Kristensen v. McGrath, 179 F. 2d 796, affirmed 340 U. S. 162 10

Long Island R. R. Co. v. United States, 140 F. Supp. 823 16

Loomis v. Lehigh Valley R. Co., 240 U. S. 43 ..... 21, 29

Louisville & N. R. Co. v. Garrett, 231 U. S. 298 ..... 21, 29

Macauley v. Waterman Steamship Corp, 327 U. S. 540 18

Manhattan Transit Co. v. United States, 24 F. Supp. 174 9

Merchant Truckmen's Bureau v. United States, 16 F. Supp. 998 9

Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41 18

National Water Carriers Ass'n v. United States, 126 F. Supp. 87 9

Olin Industries, Inc. v. National Labor Relations Board, 72 F. Supp. 225 10

Peik v. Chicago & N. W. R. Co., 4 Otto. 164 ..... 21, 29

Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362 21, 29

Rochester Telephone Corp. v. United States, 307 U. S. 125 18

Page

Securities and Exchange Commission v. Chenery Corp., 318 U. S. 80 28

Simpson v. Shepard, 230 U. S. 352 ..... 21, 29

Skinner v. Eddy Corp. v. United States, 249 U. S. 557 9, 12

State of Florida v. United States, et al., 281 U. S. 194 27

Terminal R. Assn. v. United States, 266 U. S. 17 ..... 21, 30

United States v. Griffin, 303 U. S. 226 18

United States v. Western P. R. Co., 325 U. S. ..., 1 L. Ed. 2d 126 18

Universal Camera Corp. v. N. L. R. B., 340 U. S. 474 10

Statutes and Rules

Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001, et seq.:

Section 8 ..... 20, 23, 27, 36

Section 10 ..... 18, 37

Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C., et seq.:

Section 1(5) 4

Section 3 4

Section 5a 4

Section 6(3) 4, 33

Section 13(1) 29, 34

Section 15(7) 4, 8, 19, 26, 34

Section 17(2) 4, 14

Elkins Act, 49 U. S. C. 41, et seq. 30

28 U. S. C. 2322 5

28 U. S. C. 2323 5

20 F. R. 1465 15

Page

Interstate Commerce Commission General Rules of Practice, Rule 42, 49 C. F. R. 1.42 14

Interstate Commerce Commission Special Rules of Practice, 49 C. F. R. 1.200 15

Miscellaneous

Sharfman, The Interstate Commerce Commission, pp. 58-60 ..... 9, 12

Interstate Commerce Commission, 69th Annual Report, pp. 101-102 15

In the

Supreme Court of the United States

OCTOBER TERM, 1956

No. 125

ARKANSAS & LOUISIANA MISSOURI RAILWAY COMPANY; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; GULF, COLORADO AND SANTA FE RAILWAY COMPANY, *et al.*,

Appellants,

v.

AMARILLO-BORGER EXPRESS, INC., *et al.*,

Appellees.

On Appeal from the United States District Court for the Northern District of Texas

---

BRIEF OF THE APPELLANTS

OPINION BELOW

The Opinion of the District Court (R. 42-59) is reported at 138 F. Supp. 411.

JURISDICTION

This suit was brought in a three-judge district court under 28 U. S. C. 1336 to set aside and enjoin an order

of the Interstate Commerce Commission. The judgment of the District Court was entered on January 24, 1956, and a motion for new trial was overruled on February 21, 1956. Notice of appeal was filed in that court by the railroads on March 14, 1956. The Statement of Jurisdiction was filed May 31, 1956, and probable jurisdiction was noted on October 8, 1956. The jurisdiction of this Court to review the judgment on direct appeal is conferred by 28 U. S. C. 1253 and 2101(b).

STATUTES INVOLVED

Sections 6(3), 13(1), and 15(7) of the Interstate Commerce Act [49 U. S. C., Sections 6(3), 13(1), and 15(7)], and Sections 8 and 10 of the Administrative Procedure Act (5 U. S. C., Sections 1007 and 1009), are set forth in Appendix A, *infra*, pages 33-39.

QUESTIONS PRESENTED

Section 15(7) of the Interstate Commerce Act provides that the Commission, pending a hearing and decision on the lawfulness of a new rate schedule filed with it, "may from time to time suspend operation of such schedule and defer the use of such rate * * *." Acting under this provision, the Interstate Commerce Commission suspended the operation of certain rate schedules. On reconsideration, the Commission vacated the suspension. After the rate schedules had become effective, but prior to the hearing and decision by the Commission on their lawfulness, the District Court set them aside as "void ab initio" on the ground that the Commission's order vacating the sus-

pension was unsupported by proper findings. The following questions are presented by this appeal:

1. Whether the Commission's order vacating the suspension is subject to judicial review.

2. Whether the Commission was required to make findings in support of its order vacating the suspension.

3. Whether the District Court erred in enjoining the operation of the rate schedules after they had gone into effect but prior to a final decision on their lawfulness by the Commission.

STATEMENT

This is an action brought to enjoin an order of the Interstate Commerce Commission, Division 2, acting as an Appellate Division, entered November 14, 1955, in a proceeding entitled *Carbon Black—Southwest to United States and Canada*, Investigation and Suspension Docket No. 6476 (Appendix C, infra, pages 43-44).

The controversy had its inception in a request made of the railroads by the principal producers and consumers of carbon black[1] for lower basis of rates on that commodity (R. 26-27). The request was grounded on the assertion that the rates then in effect were unjust, unreasonable, and unduly preferential in violation of §§1 and 3 of the

[1]Carbon Black, a product of natural gas and petroleum hydrocarbons, is produced in Texas and other Southwestern States. Primary consumers are rubber manufacturers located in Ohio, other northern states, and Canada (R. 26).

Interstate Commerce Act[2] **(R. 27). After twenty months** of extensive consideration by, and numerous public hearings before railroad rate bureaus,[3] the Southwestern and Western Trunk-Line Rail Carriers filed with the Interstate Commerce Commission pursuant to Section 6(3) of the Act,[4] proposed schedules of reduced rates and charges on carbon black to become effective September 24, 1955 (R. 27). Motor carrier rate bureaus and a motor carrier filed protests against the proposed rates and petitions for their suspension and investigation (R. 3, 27). Replies to the protests and petitions were filed by the proponents of the rates, including the principal shippers of carbon black (R. 4). The matter was referred to the Board of Suspension of the Commission[5] for initial action (R. 4, 27). On September 22, 1955, two days before the rates were to become effective, the Board voted not to suspend, but to investigate the proposed rates (R. 27).

The matter was immediately appealed to Division 2 of the Commission, acting as an Appellate Division, which entered an order on September 23, 1955 (Appendix B, infra, pages 41-42), suspending the proposed rate schedules "to and including April 23, 1956, unless otherwise ordered by this Commission" (R. 6, 46).

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[2]54 Stat. 900, as amended [49 U. S. C. 1(5)]; 24 Stat. 380, as amended (49 U. S. C. 3).

[3]Bureaus created by agreement among the carriers approved under the provisions of §5a of the Act (62 Stat. 472, 49 U. S. C. 5a).

[4]24 Stat. 380, as amended [49 U. S. C. 6(3)].

[5]The Board of Suspension consists of five employees of the rate division of the Commission duly constituted as a Board pursuant to the provisions of §17(2) of the Act. [54 Stat. 913, 49 U. S. C. 17(2) for the purpose of taking initial action in the investigation and suspension of rates within the provisions of §15(7) of the Act (44 Stat. 1447, 49 U. S. C. 15(7).]

Thereafter, petitions for reconsideration were filed by the proponents of the rates, and replies thereto were filed by the protestants. By the order, which is the subject of this action, entered November 14, 1955 (Appendix C, infra, pages 43-44, R. 7), Division 2 of the Commission vacated the suspension as of November 24, 1955, but directed that the investigation into the lawfulness of the rates continue.

Meanwhile, the Commission set the matter down for hearing and so notified the parties on November 1 and 16, and December 6, 1955. Hearings were held before an Examiner on February 2 and 3, 1956, at Dallas, Texas (R. 20, 22).

The present action was commenced by appellees (eight motor carriers engaged in part in the transportation of carbon black) on November 23, 1955, one day before the rate schedules were to go into effect under the terms of the challenged November 14 order.[6] The complaint sought, *inter alia*, a temporary restraining order against the November 14th order for the purpose of preventing the rate schedules from going into effect. On the same date, the request for a temporary restraining order was denied. On November 24, 1955, pursuant to the Commission's November 14th order, the rate schedules went into effect.

On December 12, 1955, the parties were heard before the three-judge Court on appellees' application for an

[6]The United States was made defendant in accordance with 28 U. S. C. 2322. Under 28 U. S. C. 2323, the Commission and the Southwestern rail carriers duly intervened. The United States and the Interstate Commerce Commission have taken a separate appeal from the decision below. No. 224, *United States of America and Interstate Commerce v. Amarillo-Borger Express, Inc., et al.*

interlocutory injunction. On January 23, 1956, the Court filed its opinion[7] (R. 42-59) and on the following day entered its judgment (R. 59-61). The judgment granted a final injunction setting aside the Commission's November 14th order, remanded the matters to the Commission for further proceeding not inconsistent with the Court's opinion, and "voided ab initio" the reduced rates. On February 21, 1956, the Court denied appellants' motion for a new trial (R. 66). This Court noted probable jurisdiction on October 8, 1956[8] (R. 71).

SUMMARY OF ARGUMENT

In 1910, the Mann-Elkins amendment of the Interstate Commerce Act first authorized the Interstate Commerce Commission, on the filing of rates by interstate rail carriers, to suspend the operation of the rates for a temporary period. Since enactment of that amendment, Commission decisons relating to suspensions have been held unreviewable by every court that has dealt with the issue. The exercise of the suspension power is properly "agency action by law committed to agency discretion" and thus exempt from judicial review under §10 of the Administrative Procedure Act. From the nature of the rate making process, the Commission's determinations to suspend or not to suspend proposed rates represent but tentative, informal conclusions as to probable lawfulness of the rates. Such determinations are made rapidly, upon informal and often incomplete

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[7] *Amarillo-Borger Express v. United States, 138 F. Supp. 411.*

[8] *Arkansas & Louisiana Missouri Railway Co.; Atchison, Topeka & Santa Fe Railway Co.; Gulf, Colorado & Santa Fe Railway Co., et al., Appellants v. Amarillo-Borger Express, Inc., ... U. S. .....; 1 L. ed. (2d) 43, 44.*

presentations, and in large numbers. To a unique extent, such determinations are based so much upon experience rather than upon a record in the conventional sense, that judicial review is inappropriate.

The issues in suspension proceedings are complex and must be handled under the pressure of constantly changing conditions. The development of sound standards require incisive anlytical competence and the application of these standards require conspicuous practical experience beyond the conventional experiences of judges. Insulating these temporary determinations from searching judicial inquiries is a practical and proper accommodation between the courts and the Commission for utilization of the specialized knowledge of the Commission in achieving desirable uniformity. Moreover, the assumption of jurisdiction by the District Court was premature, for the challenged order was but an interim step in the administrative proceeding and lacked the requisite finality for judicial review.

If, however, judicial review is to be enlarged to encompass interim suspension orders, the challenged order is clearly a lawful exercise of the Commission's statutory authority. Nothing in either the Interstate Commerce Act or the Administrative Procedure Act requires an interlocutory order vacating a previously ordered suspension of rates be supported by findings. In any event, the District Court lacked jurisdiction to invalidate rates which had already gone into effect and to require observance of rates which had been previously cancelled.

ARGUMENT

I. THE COMMISSION'S ACTION IN VACATING SUSPENSION OF THE PROPOSED RATE SCHEDULES, PENDING A HEARING AND FINAL DECISION INTO THE LAWFULNESS, WAS IN ACCORD WITH STATUTORY AUTHORITY AND IS NOT SUBJECT TO JUDICIAL REVIEW.

In 1910, Congress, in the Mann-Elkins Amendment of the Interstate Commerce Act, first authorized the Commission, on the filing of rates by interstate carriers, to suspend the operation of the rates for a stated period. This authority is presently embodied in §15(7) of the Interstate Commerce Act.[9] (Appendix A, infra, pages 33-39). Insofar as pertinent here, §15(7) provides that the Commission, pending a hearing and decision on the lawfulness of a new rate schedule filed with it, "may from time to time suspend the operation of such schedule and defer the use of such rate * * *, but not for a longer period than seven months beyond the time when it would otherwise go into effect * * *." Congress thus sought to protect a carrier's traditional right to initiate its own rates while at the same time providing a means "for checking at the threshold new adjustments that might subsequently prove to be unreasonable or discriminatory, safeguarding the community against irreparable losses and recognizing more fully that the Commission's essential task is to establish

[9] 44 Stat. 1447 [49 U. S. C. 15(7)]. Comparable provisions are found in parts II, III, and IV of the Act: 49 Stat. 558, as amended [49 U. S. C. 316(g)] (Motor Carriers); 54 Stat. 937 [49 U. S. C. 907(g)] (Water Carriers); 56 Stat. 288 [49 U. S. C. 1006(e)] (Freight Forwarders).

and maintain reasonable charges and proper rate relationships."[10] Reconciliation of these sometimes conflicting interests in a particular case was left entirely to the Commission. *Board of Commissioners v. Great Northern R. Co., 281 U. S. 412, 429.*

From enactment of the Mann-Elkins amendment to the district Court's opinion in this case, Commission decisions relating to suspension under §15(7) and comparable provisions of the Act have been held non-reviewable by every court that has dealt with the issue. *M. C. Kiser Co. v. Central of Georgia Ry. Co., 236 Fed. 573 (S. D. Ga. 1916), affirmed 239 Fed. 718 (C. A. 5, 1917),* and cited with approval in *Skinner & Eddy Corp. v. United States, 249 U. S. 557, 565; Algoma Coal & Coke Co. v. United States, 11 F. Supp. 487, 495 (D. Va. 1935) (three-judge court); Merchant Truckmen's Bureau v. United States, 16 F. Supp. 998, 1000 (S. D. N. Y. 1936); Manhattan Transit Co. v. United States, 24 F. Supp. 174, 177 (D. Mass. 1938) (three-judge court); Carlsen v. United States, 107 F. Supp. 398 (S. D. N. Y. 1952) (three-judge court); National Water Carriers Ass'n v. United States, 126 F. Supp. 87, 90-91 (S. D. N. Y. 1954) (three-judge court).*[11] In each of these six cases, the Court declined on jurisdictional grounds to consider the validity of an order suspending or refusing to suspend new rates.

[10] I. L. Sharfman, *The Interstate Commerce Commission, Vol. I, pages 58-59.*

[11] A statement in Judge Hutcheson's opinion in *Ferguson-Steere Motor Co. v. United States, 126 F. Supp. 588 (D. Tex., 1954), at 591,* apparently constitutes the only judicial expression to the contrary. But see concurring opinion of Judge Davidson in *Ferguson-Steere, supra,* who rests his decision on the ground that such orders were unreviewable altogether.

Despite these long-established precedents, the Court below, from the provisions of §10 of the Administrative Procedure Act and their ambiguous legislative history,[12] concluded that an interlocutory order of the Commission issued pending a hearing and final decision on the lawfulness of rates, vacating a previously ordered suspension of such rates, is subject to judicial review. It is our contention that in so doing, the district court misread §10 of the Administrative Procedure Act, misconceived the nature of the suspension procedure, and ignored the doctrine of administrative finality.

a. *The Administrative Procedure Act Has Not Enlarged the Judicial Scope of Review of Suspension Proceedings.*

Apparently conceding that historically the Commission's exercise of its rate suspension powers were not subject to judicial review (138 F. Supp. 416), the court below has found reviewability in §10 of the Administrative Procedure Act.

But §10, by its own terms and its legislative history, has not conferred upon the court any additional reviewing powers over the Commission's suspension procedure which it did not have in the past.[13]

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[12] *Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474, 483.*

[13] See *Atchison, Topeka & Santa Fe Ry. Co. v. United States, 130 F. Supp. 76, (D. Mo., 1955), affirmed 350 U. S. 892,* where a unanimous court at page 78, said:

> "Plaintiffs also refer to §10 of the Administrative Procedure Act, 5 U. S. C. A. §1009, but it is clear that that act merely was a declaration of existing law where judicial review is provided."

To the same effect is the opinion in *Olin Industries, Inc. v. National Labor Relations Board, 72 F. Supp. 225, 228 (D. Mass., 1947).* Also, see *Universal Camera Corp. v. Labor Board, 340 U. S. 474.* Cf. *Kristensen v. McGrath, 179 F. 2d 796, C. A. D. C., 1949, affirmed 340 U. S. 162.*

The first sentence of §10 states two basic exceptions to the coverage of this section:

> "Except so far as (1) statutes preclude judicial review or (2) *agency action is by law committed to agency discretion.*" (Emphasis supplied.)

The legislative history regarding this exception points out that—

> "*Matters of discretion are necessarily exempt from the section, since otherwise courts would in effect supersede agency functioning.* But that does not mean that questions of law properly presented are withdrawn from reviewing courts. *Where laws are so broadly drawn that agencies have large discretion, the situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administrative powers.* * * *." (Emphasis supplied.) (House Committee Rep. 1946, p. 41; S. Doc. 248 79th Cong., p. 275.)

Section 15(7) of the Interstate Commerce Act, providing that the Commission "may from time to time suspend the operation" of proposed rate schedules, suggest clearly on its face that the exercise of the suspension power is "agency action by law committed to agency discretion," and thus exempt from judicial review under §10 of the Administrative Procedure Act. This reading is nothing more than reiteration of this Court's holding in *Board of Railroad Commissioners v. Great Northern Ry. Co., 281 U. S. 412, 429*, that "This power of suspension was entrusted to the Commission only." It is also in accord with the unbroken line of lower federal court decisions both before and after enactment of the Administrative Procedure Act.[14]

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[14] See page 9, infra.

It is submitted that the conclusion thus described and repeatedly reiterated is a sound one. Its validity rests on two important grounds. First, from the nature of the rate-making procedure prescribed by the Interstate Commerce Act the Commission's determinations to suspend or not to suspend proposed rates (or to vacate a suspension previously ordered, pending a hearing and final decision) represents but tentative and informal conclusions as to the probable lawfulness of such rates. Such determinations are made rapidly, upon informal and often incomplete presentations and in large numbers. To a unique extent, such determinations are based so much upon experience rather than upon a record in the conventional sense, that judicial review is inappropriate. Secondly, it is a practical and proper accommodation between the courts and the Commission for utilization of the expertness and specialized knowledge of the administrative agency in achieving desirable uniformity. We turn to these considerations.

The Interstate Commerce Act contemplates that most railroad rates will be established on the carriers' initiative by filing new tariffs with the Commission and publishing them in accordance with §6. Prior to 1910, the Commission could not either upon complaint filed under §13 or upon its own motions prevent such carrier-initiated rates from becoming effective. Only after a full hearing could the Commission set aside such rates. *Skinner & Eddy Corp. v. United States, 249 U. S. 557, 564-565.* To correct this deficiency in the regulatory scheme[15] the Commission was

[15] I. L. Sharfman, *The Interstate Commerce Commission, Volume I, pages 58-60.*

empowered to suspend railroad-initiated rates before they became effective for a specified period pending investigation by the Commission.

Thus, §15(7) provides that where new rates have been filed with the Commission:

> "the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, and the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period * * *."

It is therefore clearly provided that the Commission may suspend new rates for a period not exceeding seven months. The circumstances in which the Commission is to suspend or not to suspend is not specified. The only stated condition is, in the event of suspension, a statement in writing of the reasons for such suspension, shall be filed with the schedule and delivered to the carriers affected thereby. At the end of the suspension period, the railroads may put the proposed rates into effect even though the Commission has not completed its investigation. In any event,

the Commission does not make a final decision as to the lawfulness of the rates until it completes its formal hearing procedure.

Under Section 6(3) of the Act, railroads must give to the Commission and to the public 30 days' notice of proposed rate changes, unless the Commission permits such changes upon shorter notice. Parties desiring to challenge the lawfulness of the proposed rates must file their protests and requests for suspension at least 12 days prior to the effective date of the intended rate change. 49 C. F. R. 1.42. The matter is thereafter considered by the Board of Suspension, which consists of a board of five employees of the Commission established pursuant to §17(2) of the Interstate Commerce Act, 49 U. S. C. 17(2), for the purpose of taking initial action.

Indicative of the informality of suspension proceedings are the Commission's rules dealing with the content of protests and the special rules of practice before the Board of Suspension. Rule 42 of the Commission's General Rules of Practice, 49 C. F. R. 1.42 merely requires that the protest should identify the publishing carrier, the tariff and schedules, and specific items protested, and "should state the grounds in support thereof, indicate in what respect the protested tariff or schedule is considered to be unlawful, and state what protestant offers by way of substitution."[16] The rule provides that no protest shall include a prayer that it be considered a formal complaint.

[16]Even telegraphic protests may be filed in the event of an emergency, providing the protestants then submits a pleading complying with the above requirements.

If the protestant intends to proceed further against a tariff which has not been suspended, then a formal complaint or petition must be filed.

The special rules of practice governing the procedure of the Board of Suspension, 49 C. F. R. 1.200, state in part: "The proceedings of the Board of Suspension * * * shall be informal. No transcription of such proceedings will be made. Subpoenas will not be issued and, except when application or petitions are required to be attested (in the case of 4th Section applications), oaths will not be administered." These rules also set out the procedure for obtaining review of actions of the Suspension Board where it fails to suspend rates. Petitions may be filed with the Commission for reconsideration by the designated appellate division—i.e., Division 2 (20 F. R. 1465). Petitions must be filed at least two days prior to the effective date of the tariff.

The reason for such informality—apart from the fact that suspension proceedings represent but a preliminary step in the investigation of proposed rates—is apparent from the number of suspension cases handled annually by the Commission. During the period November 1, 1954, to November 1, 1955, nearly 5,000 requests for suspension were filed against 4,000 rate adjustments. 69th Annual Report of the Commission, pages 101-102. This number becomes even more significant in view of the speed required in disposing of suspension cases. As the procedure outlined above makes clear, the 30-day period of notice is commonly narrowed down to 12 days in which the Com-

mission must decide whether to suspend or not to suspend rates, and to two days in which the appellate division must decide whether to affirm or reverse the board's ruling. This necessity for acting expeditiously makes it impossible to cloak these proceedings with any degree of the formality that characterizes, for example, the subsequent hearing "on the merits" of the complaint against the new rate schedules.

If the lower court's unprecedented action is permitted to stand, then the Commission's action in granting or denying this great number of suspension requests would be subject to review. The necessary result, aside from an intolerable burden of litigation,[17] would be a substantial limitation on the Commission's suspension powers. This Court said in *Interstate Commerce Commission v. Inland Waterways Corp., 319 U. S. 691, at page 689:*

> "The construction contended for would have the effect of either imposing a practically impossible burden upon the Commission or of making resort to the Commission's power under section 15(7) so rare as to make such powers of little practical significance. Suspension cases are very numerous, and in many of them the construction contended for would require the Commission to 'readjust the entire rate structure of an important section of the country.'"

As the construction adopted by the lower court would gravely handicap the Commission in the exercise of its

[17] Following closely upon the heels of the decisions below, two suits substantially similar to the instant case were filed challenging Commission order vacating prior orders of suspension. *Dixie Carriers, Inc. v. United States, 143 F. Supp. 844 (S. D., Tex. 1956); Long Island Railroad Co. v. United States, 140 F. Supp. 823 (E. D. N. Y. 1956).* The first suit, arising in the Fifth Circuit, as did the instant case, followed the decision below in setting aside the Commission order under review. The court in the *Long Island* case did likewise, with Circuit Judge Swann dissenting.

suspension powers, it is inconceivable that anyone could seriously contend that such results were precisely what Congress intended by enactment of §10 of the Administrative Procedure Act. Yet, when analyzed, that is exactly the effect of the lower court's opinion, Congress, to the contrary, has expressly recognized that from the purely practical concept, there are areas of "agency action by law committed to agency discretion," just as there are areas of judicial discretion, which must be insulated from review. Tentative determinations by the Commission under its suspension powers are, we submit, rightfully within that area.

There is probably no other power lodged with the Commission lying more completely within the special competence of that body than the suspension of proposed new rates. The task of establishing and maintaining reasonable charges and proper rate relations involves an intimate and specialized knowledge of an infinite variety of factors. Quite obviously, there is no other way to make the rapid, tentative determinations required of the Commission than by bringing that knowledge to bear on each situation as it arises. Neither a record in the conventional sense nor issues of fact within the conventional experience of judges are available to test the correctness of the Commission's determinations. We submit that the only practical and proper accommodation between the Courts and the Commission in achieving uniformity and consistency in the regulation of rates is to leave these tentative determinations free of searching judicial inquiry.

b. *The Court Was Without Jurisdiction Because There Was No Reviewable Order Under the Doctrine of Administrative Finality.*

It is a long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or theoretical injury until the prescribed administrative remedy has been exhausted, *Director General of Railroads, et al. v. The Viscose Co., 254 U. S. 498, 502-503; Myers v. Bethlehem Shipbuilding Corporation, 303 U. S. 41, 50-51; United States v. Griffin, 303 U. S. 226; Federal Power Commission v. Metropolitan Edison Co., 304 U. S. 375, 384-387; Macauley v. Waterman Steamship Corp., 327 U. S. 540, 544-545; United States v. Western P. R. Co., 352 U. S. , 1 L. Ed. 2d 126.* See also, *Rochester Telephone Corp. v. United States, 307 U. S. 125.*

The Commission's order challenged in this case expressly provided that "the proceeding of investigation of said schedule shall continue in full force and effect." The investigation, instituted prior to the hearing before the District Court, is presently under way. After its completion, and after all interested parties have been heard, the Commission will decide the lawfulness of the rates and may, if it finds such rates to be unlawful, prescribe what the substitute rates shall be. The Commission's final decision will unquestionably be reviewable. Until this decision is made the assumption of jurisdiction by the District Court is premature.

"Section 10(e) of the Administrative Procedure Act does not require a different result. That Act purports to strengthen rather than to weaken the principle requiring

the exhaustion of administrative remedy before permitting court review." *Federal Power Commission v. Colorado Interstate Gas Co., 348 U. S. 492, 499-500.*

II. THE COMMISSION'S ORDER VACATING SUSPENSION OF THE PROPOSED RATE SCHEDULES IS NOT REQUIRED TO BE SUPPORTED BY FINDINGS.

Even assuming reviewability of the Commission's order of November 14, 1955, the Court below erred in setting aside that order on the ground that it was not accompanied by sufficient findings.

The Commission's suspension order of September 23, 1955, stated in part:

> "* * * there is reason to believe that they (the proposed rate schedules) would, if permitted to become effective, result in rates and charges, * * * which would be unjust and unreasonable in violation of the Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy; * * *."

This order, suspending the proposed rates, was vacated by the Commission's order of November 14, which contained the following statement:

> "*It further appearing*, That consideration has been given to petitions of the respondents requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor; * * *."

The District Court held that the last quoted phrase was legally insufficient to support a vacation of the prior suspension.

At the outset, it should be noted that §15(7) only requires the Commission to state reasons when it suspends rates;

it does not require reasons when the Commission refuses to suspend or vacate a previous suspension.[18] Nevertheless, in the instant case, the District Court concluded that a more detailed statement of reasons was necessary.

We submit that section 8 of the Administrative Procedure Act by its express terms does not apply to the Commission's action in suspending or refusing to suspend rates. At the very outset section 8 states:

> "In cases in which a *hearing* is required to be conducted in conformity with section 7—." (Emphasis supplied.)

This language necessarily qualifies the balance of section 8, including the provision in section 8(b) relied upon by this Court in its opinion. Therefore, unless "a hearing * * * conducted in conformity with section 7" is a prerequisite to Commission action granting or denying suspension, the Commission was not bound by section 8(b) in making its order of November 14, 1955.

The Senate report of 1945 on the Administrative Procedure Act clearly indicates the thinking of Congress when it considered the enactment of section 8. It said:

> "Like section 7, upon which section 8 depends, this section is supplementary to sections 4 and 5 in cases in which *agency action is required to be taken after hearing provided by statute* and not otherwise excepted from the operation of section 4 or 5. [Senate Com-

[18] That a vacation of a prior suspension order may often be tantamount to an initial refusal to suspend is suggested by the chronology of this case. Here, the proposed rates were to become effective on September 24; the Board of Suspension refused to suspend on September 22; on appeal, Division 2 suspended the rates on September 23. It seems likely, in this and many other cases of a similar chronology, that the Division has opportunity to make a considered judgment only after its initial action to suspend.

mittee Report, 1945, p. 23; S. Doc. 248, 79th Congress, p. 209.]

"Sections 4 and 5 prescribe the basic requirements for the making of rules and the adjudication of particular cases. *In each case, where other statutes require opportunity for an agency hearing, sections 7 and 8 set forth the minimum requirements for such hearings* and the agency decisions thereafter while section 11 provides for the appointment and tenure of examiners who may participate." [Senate Committee Report, 1945, p. 8; S. Doc. 248, 79th Congress, p. 194.] [Emphasis supplied.]

In considering the applicability of the Administrative Procedure Act to the instant proceeding, resort must be made to other relevant provisions of the Act. This proceeding involves the making of rates which the courts have universally recognized as a legislative function. *Peik v. Chicago N. W. R. Co., 4 Otto 164; Reagan v. Farmers' Loan & T. Co., 154 U. S. 362; Simpson v. Shepard (Minnesota Rate Cases), 230 U. S. 352; Louisville & N. R. Co. v. Garrett, 231 U. S. 298; Loomis v. Lehigh Valley R. Co., 240 U. S. 43; Terminal R. Asso. v. U. S., 266 U. S. 17; Atchison, T. & S. F. Ry. Co. v. U. S., 232 U. S. 199, 221;* cf. *F. C. C. v. Pottsville Broadcasting Co., 309 U. S. 134, 144.* The provisions of section 2 of the Administrative Procedure Act, 5 U. S. C. 1001, sets forth the definitions of the terms used in that act. Section 2(c), referring to rules and rule making, states in part:

" 'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and

includes the approval or prescription for the future of rates * * *." [Emphasis supplied.]

The drafters of the Administrative Procedure Act, cognizant of the separation of functions of our type of government, properly placed rate making as performed by an administrative agency within the scope of those provisions of the Administrative Procedure Act referring to rules and rule making. Section 4 of the Administrative Procedure Act, 5 U. S. C. 1003, establishes the procedure to be followed by an administrative agency in rule-making functions. Section 4(b) specifically limits the application of sections 7 and 8 to cases "Where rules are required by statute to be made on the record after opportunity for an agency hearing * * *." And the legislative history upon this portion of the Administrative Procedure Act emphatically indicates that Congress did not intend to make rate-making procedures of the type challenged here subject to the requirements of the provisions of sections 7 and 8 of the Administrative Procedure Act. The Senate Judiciary Committee Print of June, 1945 (reprinted in Administrative Procedure Act—Legislative History, Senate Document No. 248, 79th Cong., 2d Sess., at pages 19 and 20), states:

> "This subjection, which provides for public rule making procedures, applies only to the type of rules for which notice is required by subsection (a) above—that is, substantive rules, which involve true administrative legislation. As to that type of rules, moreover, it leaves agencies free to choose from the several common types of informal public rule making procedures, the simplest of which is to permit interested persons to submit written views or data, expect where Congress has required that rules be issued only upon a

hearing. In the latter case, the hearing and decision procedures of sections 7 and 8 necessarily apply. Thus, the provision does not extend present requirements except to require agencies, in the issuance of substantive rules, to permit at least the submission of written views or suggestions.

* * * * *

"It should be noted that no requirement of formal administrative hearing is imposed except where Congress has by some other statute required that rules be issued upon hearing."

In *American Trucking Ass'ns v. United States, 344 U. S. 298*, this Court had to consider the allegation that the Commission in promulgating leasing regulations under Part II of the Interstate Commerce Commission Act relating to motor carriers failed to comply with the provisions of sections 7 and 8 of the Administrative Procedure Act. The Court at pages 319-320 stated:

"For §7 of the Administrative Procedure Act is limited by its own terms to 'hearings which section 4 or 5 requires to be conducted pursuant to this section.' Turning to those sections, it is found that they invoke §7 only when specified by statute: 'Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.'

"In short, §7 applies only when hearings were required by the statute under which they were conducted to be made on the record and with opportunity for oral hearing. As we have pointed out, the rule-making authority in the instant case stems from §204(a)(6) of the Motor Carrier Act; nothing there requires record or hearing, in direct contrast with the rate-making procedure provisions of §§ 216(e) and

> 218(b). Hence, whatever our view of the substantiality of the evidence, we do not think that the rules must fall because the Commission failed to assume and satisfy a 'burden of proof'."[19]

The Supreme Court then went on to say at page 320:

> "Similar reasoning supports our conclusion that §8(b) of the Administrative Procedure Act, which requires that decisions shall 'include a statement of (1) findings and conclusions,' invoked by appellants in No. 26, is likewise inapplicable. *For it, in turn, is limited to a 'hearing * * * required to be conducted in conformity with section 7.'* " (Emphasis supplied.)

Mr. Justice Harlan, then sitting on the United States Court of Appeals for the Second Circuit, had occasion to refer to the *Leasing* case, supra, when the court refused to enjoin the effectiveness of a revised regulation promulgated by the Civil Aeronautics Board. In *Air Line Pilots Ass'n, Internat'l v. Civil Aeronautics Bd., 215 F. 2d 122*, he pointed out at page 124:

> "It is also claimed that the procedure followed by the Board failed to meet the requirements of the Administrative Procedure and Civil Aeronautics Act. I think this is not so. The Special Air Regulation involved here is easily within the definition of a 'rule' as contained in §2 of the Administrative Procedure Act, 5 U. S. C. A. §1001(c). And the procedure pursued by the Board conforms to the 'rule-making' requirements of §4 of that Act, 5 U. S. C. A. §1003. Petitioners had actual notice of proposed rule-making and were afforded an opportunity, of which they availed themselves, to participate in the proceedings

[19]Section 216(e), 49 U. S. C. 316(e), provides in part:

"Whenever, after hearing, * * *." [Emphasis supplied.]

The same language is found in section 218(b), 49 U. S. C. 318(b), and comparable provisions are found in section 13 of Part I of the Interstate Commerce Act affecting rail carriers.

through submission of written data, views, and oral argument.

> "The fact that the Board did not proceed by way of the more formal route provided in §§7, 8 of the Administrative Procedure Act, 5 U. S. C. A. §§1006, 1007, is of no moment in this proceeding, since such procedure is required only where 'rules are required by statute to be made on the record after opportunity for an agency hearing.' §4, Administrative Procedure Act, 5 U. S. C. A. §1003(b); see *American Trucking Ass'ns. v. United States*, 1953, 344 U. S. 298, 319-320, 73 S. Ct. 307, 97 L. Ed. 337. No such requirement is to be found in the Civil Aeronautics Act. Even if the Board had acted via its pending general rule-making proceeding, the petitioners would have been entitled to no more formal hearing than they received in this instance."

See also *Eastern Air Lines v. Civil Aeronautics Bd., 185 F. 2d 426, 427-428 (C. A. D. C., 1950); Cook-Cleland Catalina Airways v. Civil Aeronautics Bd., 195 F. 2d 206, 207 (C. A. D. C., 1952); Kenny v. United States, 103 F. Supp. 971 (D. N. J., 1952); George A. Rheman Company v. United States, 133 F. Supp. 668, 673 (D. S. C., 1955).*

Senator McCarran, in discussing the Administrative Procedure Act on the Senate floor, indicated his awareness of the different function of the administrative agencies and the necessity for hearings when he said:

> "Quite different procedures are provided by the bill for the legislative and judicial functions of administrative agencies. In the rule-making, that is, legislative, function the bill provides that, with certain exceptions, agencies must publish notice and at least permit interested parties to submit their views in writing for agency consideration before issuing gen-

> eral regulations. *No hearings are required by the bill unless statutes already do so in a particular case. Similarly, in adjudications—that is, the judicial function—no agency hearings are required unless statutes already do so, but in the latter case the mode of hearing and decision is prescribed.* Where existing statutes require that either general regulations—which the bill calls rules—or particularized adjudications—which the bill calls orders—shall be made after agency hearing or opportunity for such hearing, then section 7 of the bill spells out the minimum requirements for such hearings; section 8 states how decisions shall be made thereafter, and section 11 provides for examiners to preside at hearings and make or participate in decisions. [92 Cong. Rec. p. 2151 (1946).] (Emphasis supplied.)

Section 15(7) of the Interstate Commerce Act, 49 U. S. C. 15(7), provides in part:

> "* * * the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a *statement in writing of its reasons for such suspension*, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, * * *." (Emphasis supplied.)

Nowhere in the provisions of section 15(7) has Congress indicated in any manner that before the Commission suspends rates a hearing is required and the same is equally true with respect to the refusal to suspend rates. Section 15(7) does admonish that Commission to provide "a statement in writing of its reasons" for suspension to the carrier whose rates are suspended, but the Act is devoid of any insinuation that reasons must be given for refusal to suspend or where it vacates a prior suspension order.

It follows that section 8(b) of the Administrative Procedure Act, which states in part—

> "* * * All decisions * * * shall * * * include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; * * *."

has no application whatsoever to the action taken by the Commission. The suspension of rates is merely "* * * a preliminary decision by * * *" the Commission and "is a step in an administrative proceeding." *Ewing v. Mytinger & Casselberry, 339 U. S. 594, 598.* This Court in the latter case further went on to say—

> "* * * We have repeatedly held that no hearing at the preliminary stage is required by due process so long as the requisite hearing is held before the final administrative order becomes effective (citing cases)."

From the foregoing review of the statutory provisions of the Administrative Procedure Act and the supporting judicial opinions, it is patent, we believe, that the District Court has misconceived the applicability of section 8 of the Administrative Procedure Act to the Commission's order of November 14, 1955.[20]

The Court below also relied on "the general law concerning the sufficiency of Commission action." *138 F. Supp. at 419.* According to the Court, "administrative agencies must,

[20]It should be noted that section 6(d) of the Administrative Procedure Act relating to "Denials" also has no application here since the Commission's order *granted* the rail carriers' petition to vacate the suspension. In any event, Section 6(d) does not require even a "simple statement" of reasons where a denial is self-explanatory; here, the Commission's second order, reciting "good cause" clearly means that upon further consideration it found that the available information did not support the reasons which it had stated in its suspension order.

in terms beyond the statutory rubric, reveal the basis for their action by which to judge whether it has met the elemental standards of our system and statutory requirements." *138 F. Supp. 417.* But this proposition, although of course true as applied to formal proceedings, rests on the assumption that the challenged administrative action is subject to judicial review; if there is no judicial review, obviously there is no need to make findings to facilitate judicial review. And, as we have argued supra, the Commission's order challenged in this case is not subject to judicial review. In this regard, it is significant that each of the decisions cited in the opinion below *(138 F. Supp. at 417)* as to "the general law concerning the sufficiency of Commission action," involve formal proceedings for which the requirement of making findings was unquestioned and the issue was instead the adequacy of those findings. E.g., *State of Florida v. United State, et al., 281 U. S. 194; Securities and Exchange Commission v. Chenery Corp., 318 U. S. 80.*

Practical considerations again illustrate the error in this aspect of the decision below. The holding of the District Court, that the Commission's suspended actions must be accompanied by a statement of the reasons in the nature of findings, would impair seriously the effectiveness of the suspension procedure. Applied to 5000 suspension proceedings annually, it would create a heavy burden on the drafting of such reasons or findings; a burden entirely out of proportion to the tentative character of the Commission's decisions in suspension matters. It is entirely possible that the imposition of such a burden in the limited

time available for suspension action would force the Commission to make a more sparing use of the suspension power, *Interstate Commerce Commission v. Inland Waterways Corp., 319 U. S. 671, 689*, which plainly would not be responsive to the will of Congress.

III. IN ANY EVENT THE DISTRICT COURT LACKED JURISDICTION TO SET ASIDE RATES ALREADY IN EFFECT PRIOR TO A FINAL COMMISSION DECISION ON THEIR LAWFULNESS.

The decision below establishes the further precedent of invalidating rates which have already gone into effect and requiring the observance of rates which have been previously cancelled. After denying the temporary restraining order sought by the appellees and thus permitting the new rate schedules to go into effect,[21] the District Court enjoined their continued operation even while the Commission was investigating their lawfulness under Section 13(1) of the Interstate Commerce Act.

In essence, the District Court undertook the making of rates which has been recognized universally as being beyond the scope of judicial power. *Peik v. Chicago N. W. R. Co., 4 Otto 164; Reagan v. Farmers' Loan & T. Co., 154 U. S. 362; Simpson v. Shepard (Minnesota Rate Cases), 230 U. S. 352; Louisville & N. R. Co. v. Garrett, 231 U. S. 298; Loomis v. Lehigh Valley R. Co., 240 U. S.*

[21]The appellees were aware of this problem. In their complaint, in connection with their unsuccessful request for a temporary restraining order, they alleged: "Once the schedule becomes effective there is considerable doubt whether even a subsequent setting aside of the Commission's order could, in law, have the effect of cancelling the schedules." (R. 10.)

43; Terminal R. Assn. v. United States, 266 U. S. 17; Atchison, T. & S. F. Ry. Co. v. United States, 232 U. S. 199, 221; cf. *Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 144.* Indeed, the court assumed a power that not even the Commission, the agency charged by Congress with the function of rate regulation, possesses—namely, the power to suspend rates after they had gone into effect but prior to a final decision on their lawfulness. If the decision below is permitted to stand, none of the thousands of carrier-made rates which become effective each year following the Commission's refusal to suspend could be relied upon as legal charges until they had been judicially tested or until the expiration of the seven-month suspension period.

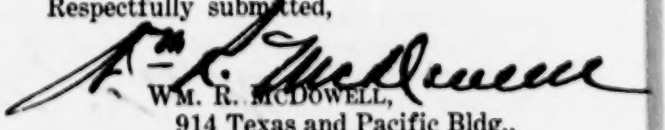
The instant case well illustrates one of the dangers implicit in such a far-reaching doctrine. The District Court's judgment, entered January 24, 1956, sets aside the Commission's order of November 14, 1955, as "void ab initio." The result of this judgment is that for over nine weeks the intervening railroads collected freight charges below the "legal" rate and that these railroads are now obligated under the Elkins Act, 49 U. S. C. 41, et seq., to collect from their shippers the undercharges—that is, the difference between the charges actually paid and the higher rate previously in force—even though the Commission has never determined that the rates are unlawful. The price of the commodity has undoubtedly reflected what was believed to have been the correct transportation charges. If the lower court is correct that the higher rate should prevail, then assuredly the prices have been too low.

If the carrier proceeds against the shipper for undercharges, it is unlikely he has any way of readjusting his past prices for sales already made to reflect the higher transportation charges. Moreover, if reductions in the rates are postponed as they were by the lower court's decision, and it is later found that the plaintiffs have no basis for their position, there is no way to compensate the shipper or receiver for having had to pay the higher rate. Since one of the aims in railroad regulation has been to stabilize rates and charges so that shippers may know from day to day where they stand, the District Court's holding obviously frustrates this purpose.

CONCLUSION

The decision of the District Court fails to recognize the plenary authority granted to the Commission by the Interstate Commerce Act to grant or deny suspension of new rates; it misconstrues and misapplies the provisions of the Administrative Procedure Act and it exceeds the scope of the judicial power by engaging in the making of rates with seriously disruptive effects. For the reasons stated, the judgment below should be reversed and the cause remanded with directions to dissolve the injunction and to dismiss the complaint.

Respectfully submitted,



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Of Counsel:
J. T. SUGGS,
January 21, 1957.

PROOF OF SERVICE

I, Wm. R. McDowell, one of the Attorneys for the Southwestern Railroads, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 21st day of January, 1957, I served copy of the foregoing Brief on the several parties thereto as follows:

1. Amarillo-Borger Express, Inc., Best Motor Freight, Knaus Truck Lines, Inc., Leeway Motor Freight, Inc., Merchant's Fast Motor Lines, Inc., Strickland Transportation Company, Inc., Sunset Motor Lines, Inc., Yellow Transit Freight Lines, Inc., Plaintiffs, by mailing a copy in a duly addressed envelope with first-class postage prepaid to their Attorney of Record, Ralph W. Currie, Esq., at his office in the Praetorian Building, Dallas 2, Texas.

2. On the United States by mailing a copy thereof in a duly addressed envelope with first-class postage prepaid to Heard L. Floore, Esq., United States Attorney for the Northern District of Texas, at his office in the Federal Building at Dallas, Texas, and by mailing a copy in a duly addressed envelope with air-mail postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D. C.

3. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope, with air-mail postage prepaid to Robert W. Ginnane, Esq., its Chief Counsel, at the office of the Commission, Washington 25, D. C.

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Counsel for Appellants.

APPENDIX A

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1 *et seq.*, are as follows:

Section 6(3).

> No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further*, That the Commission is hereby authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges or classifications not changed if, in its judgment, not inconsistent with the public interest. [49 U. S. C. 6(3).]

Section 13(1).

That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. [5 U. S. C. 13(1).]

Section 15(7).

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to

enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such

questions preference over all other questions pending before it and decided the same as speedily as possible. [5 U. S. C. 15(7).]

The pertinent provisions of the Administrative Procedure Act, 60 Stat. 237, 3 U. S. C. 1001 *et seq.*, are as follows:

Section 8.

In cases in which a hearing is required to be conducted in conformity with section 7—

(a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision, or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely

execution of its functions imperatively and unavoidably so requires.

(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof." (5 U. S. C., 1007, 60 Stat. 237.)

Section 10.

Except so far as (1) statutes preclude judicial review or (2)agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or,

in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court

shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. (5 U. S. C., 1009, 60 Stat. 237.)

APPENDIX B

CORRECTED ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an appellate division, held at its office in Washington, D. C., on the 23rd day of September, A. D., 1955.

INVESTIGATION AND SUSPENSION DOCKET

No. 6476

CARBON BLACK—SOUTHWEST TO U. S. A. & CANADA

It appearing, That there have been filed with the Interstate Commerce Commission tariff schedules setting forth new reduced rates and charges, and new rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce, to become effective September 24, 1955, and later, designated as follows:

F. C. KRATZMEIR, Agent, I. C. C. 3744:

In Supplement 157 thereto, on page 8 thereof, Item 75-A insofar as it would expire rates referenced encircled "E" held in force by reason of this suspension or make effective rates referenced encircled "226" scheduled to replace such expiring rates, throughout the tariff.

In Supplement 161 thereto, on pages 2 through 29 thereof, all COLUMN D rates, on page 24 thereof, Note A and the explanation thereof, also, on pages 25 through 29 thereof, Note B and the explanation thereof;

In Supplement 163 thereto, on pages 5 through 27 thereof, all COLUMN D rates, on pages 28 through 32 thereof, in ITEMS 220-N, 222-N, 224-M, 226-L,

228-L, 230-L, 232-K, 233-G and 234-J, all COLUMN D rates, on page 27 thereof, Note A and explanation thereof, also, on pages 28 through 32 thereof Note B and explanation thereof;

Supplement 164 in full:

In Supplement 165 thereto, on pages 2 through 7 thereof, all COLUMN D rates, on pages 3, 4 and 6 thereof, changes in headings insofar as they remove expiration reference encircled "E" applicable in connection with rates held in force by reason of this suspension.

J. F. BROWN, Agent, I. C. C. 851:

In Supplement 20 thereto, on pages 6 and 7 thereof, in ITEM 4320-B, all reduced rates, also in ITEM 4340-B, COL. D. rates.

In Supplement 24 thereto, on pages 9 and 10 thereof, in ITEM 4320-B, all rates subject to min. 65,000 pounds, also in ITEM 4340-B, all COL. D rates.

J. F. BROWN, Agent, I. C. C. 865:

In Supplements 1 and 2 thereto, on page 3 thereof, in ITEM 635-A, all COL. D rates;

In Supplement 4 thereto, on page 3 thereof, in ITEM 635-B, all COL. D rates.

And it further appearing, That upon consideration of the said schedules and protests thereto there is reason to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy; and good cause appearing therefor:

It is order, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges and regulations contained in said schedules, with a view to making such findings and orders in the premise as the facts and circumstances shall warrant.

It is further ordered, That the operation of the said schedules be and it hereby is suspended, and that the use thereof on interstate and foreign commerce be deferred to and including April 23, 1956, unless otherwise ordered by this Commission.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said schedules under the Interstate Commerce Act.

It is further ordered, That neither the schedules hereby suspended nor those sought to be altered thereby shall be changed until this proceeding has been disposed of or until the period of suspension has expired, unless otherwise ordered by the Commission.

And it is further ordered, That a copy of this order be filed with the schedules in the office of the Interstate Commerce Commission, and that copies hereof be forthwith served upon the carriers parties to the said schedules and that the said carriers be, and they are hereby, made respondents to this proceeding.

By the Commission, Division 2.

(Seal) HAROLD D. McCOY, *Secretary.*

APPENDIX C

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, DIVISION 2, acting as an appellate division, held at its office in Washington, D. C., on the 14th day of November, A. D. 1955.

Investigation and Suspension Docket No. 6476

CARBON BLACK—SOUTHWEST TO U. S. A. & CANADA

It appearing, That by an order dated September 23, 1955, the Commission, Division 2, acting as an appellate division, entered upon an investigation concerning the lawfulness of certain rates and charges and the regulations and practices stated in schedules designated therein, and suspended the operation of the said schedules to and including April 23, 1956;

It further appearing, That consideration has been given to petitions of the respondents requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor;

It is ordered, That the said order of September 23, 1955, be, and the same is hereby, vacated and set aside as of November 24, 1955, insofar as it suspended the operation of the schedules designated therein, but that the proceeding

of investigation of said schedules shall continue in full force and effect.

By the Commission, Division 2, acting as an appellate division.

(Seal) HAROLD D. McCOY, *Secretary.*

INDEX

	Page
Opinion below	1
Jurisdiction	1
Statutes involved	2
Questions presented	2
Statement	2
The suspension proceeding before the Commission	3
The proceeding in the District Court	4
The subsequent proceeding before the Commission	5
Summary of argument	6
Argument	11
Preliminary statement	11
I. The Interstate Commerce Commission's exercise of its rate suspension powers is not subject to judicial review	17
A. The exercise of the power to suspend rates is entrusted exclusively to the discretion of the Commission	18
B. The preliminary and tentative nature of suspension orders precludes their review by the courts	21
C. The appellees should have been required to exhaust their administrative remedies	26
D. The Commission's exercise of its suspension powers is not made reviewable by Section 10 of the Administrative Procedure Act	28
II. The Commission, in vacating the prior suspension order, was not required to make detailed findings	31
III. The District Court was without power to enjoin the operation of rates already in effect	39
Conclusion	44
Appendix	45

414271—57——1

Cases:

	Page
Accardi v. *Shaughnessy*, 347 U. S. 260	32
Air Line Pilots Ass'n Internat'l v. *Civil Aeronautics Board*, 215 F. 2d 122	37
Alabama Great Southern R. Co. v. *United States*, 340 U. S. 216	38
Algoma Coal & Coke Co. v. *United States*, 11 F. Supp. 487	20
American Trucking Assns v. *United States*, 344 U. S. 298	9, 34, 36, 37
Atlanta & St. Andrews Bay Ry. Co. v. *United States*, 104 F. Supp. 193	38
Board of R. R. Com'rs v. *Great Northern Ry. Co.*, 281 U. S. 412	7, 20
C. & S. Air Lines v. *Waterman Corp.*, 333 U. S. 103	7, 23
Cantlay & Tanzola v. *United States*, 115 F. Supp. 72	38
Carbon Blacks, Southwest to Central and Midwest, 66 M. C. C. 163	6
Carlsen v. *United States*, 107 F. Supp. 398	20
Carolina Scenic Coach Lines v. *United States*, 59 F. Supp. 336, affirmed 326 U. S. 680	39
Cook Cleland Catalina Airways v. *Civil Aeronautics Board*, 195 F. 2d 206	37
Director General v. *The Viscose Co.*, 254 U. S. 498	27
Eastern Airlines v. *Civil Aeronautics Board*, 185 F. 2d 426	37
Eggs and Poultry from Topeka, Kans., to Chicago, Ill., 53 M. C. C. 30	6
Ewing v. *Mytinger & Casselberry*, 339 U. S. 594	35
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U. S. 134	40
Federal Power Commission v. *Colorado Interstate Gas Co.*, 328 U. S. 492	9, 29, 30
Federal Power Commission v. *Hope Gas Co.*, 320 U. S. 591	27
Federal Power Commission v. *Metropolitan Edison Co.*, 304 U. S. 375	7, 22, 24, 37
Ferguson-Steere Motor Co. v. *United States*, 126 F. Supp. 588	20
Florida (State of) v. *United States*, 282 U. S. 194	38
Heikkila v. *Barber*, 345 U. S. 229	8, 29
Holmes et al. v. *United States*, 89 F. Supp. 894, affirmed 339 U. S. 927	27

Cases—Continued

	Page
Houston Fire & Casualty Ins. Co. v. *United States*, Civil Action No. 2448 (D. C. N. D. Tex., 1953)	21
Humble Oil & Refining Co. v. *Federal Power Commission*, 236 F. 2d 819, No. 530, this term, certiorari denied January 14, 1957	7, 24
Hunt Oil Co. v. *Federal Power Comm.*, 236 F. 2d 828	24
Interstate Commerce Commission v. *Inland Waterways Corp.*, 319 U. S. 671	32
Interstate Commerce Commission v. *Jersey City*, 322 U. S. 503	39
Isbrandtsen Co. v. *United States*, 211 F. 2d 51	28
Kenny v. *United States*, 103 F. Supp. 971	37
Kiser (M. C.) Co. v. *Central of Georgia Ry. Co.*, 236 Fed. 573, affirmed, 239 F. 718	7, 18–20
Leather from Middlesboro, Ky., to Chicago, Ill., 18 M. C. C. 265	6
Loomis v. *Lehigh Valley R. Co.*, 240 U. S. 43	40
Louisville & Nashville R. Co. v. *Garrett*, 231 U. S. 298	40
Ludecke v. *Watkins*, 335 U. S. 160	8, 29
Macauley v. *Waterman S. S. Corp.*, 327 U. S. 540	27
Magnolia Petroleum Co. v. *Federal Power Commission*, 236 F. 2d 785, No. 558, this Term, certiorari denied, January 14, 1957	30
Manhattan Transit Co. v. *United States*, 24 F. Supp 174	20
Merchant Truckmen's Bureau of N. Y. v. *United States*, 16 F. Supp. 998	20
Minnesota Rate Cases (*Simpson* v. *Shepard*), 230 U. S. 352	40
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41	27
National Water Carriers Ass'n. v. *United States*, 126 F. Supp. 87	7, 20
North Carolina v. *United States*, 325 U. S. 507	38
Pacific Inland Tariff Bureau v. *United States*, 129 F. Supp. 472	38
Peik v. *Chicago N. W. R. Co.*, 94 U. S. 164	40
Reagon v. *Farmers' Loan & Trust Co.*, 154 U. S. 362	40
Rochester Tel. Corp. v. *United States*, 307 U. S. 125	27
Shannahan v. *United States*, 303 U. S. 596	27
Simpson v. *Shepard* (*Minnesota Rate Cases*), 230 U. S. 352	40
Skinner & Eddy Corp. v. *United States*, 249 U. S. 557	12

Cases—Continued Page

Southern Pacific Co. v. *Interstate Commerce Commission*, 219 U. S. 433 42
Southern Pacific Terminal Co. v. *Interstate Commerce Commission*, 219 U. S. 498 41
Stanard v. *Olesen*, 98 L. Ed. 1151 28
Stanolind Oil & Gas Co. v. *Federal Power Commission*, 236 F. 2d 824 24
Sugar from Colorado to Kansas and Missouri, 18 M. C. C. 248 6
Terminal R. R. Assn. v. *United States*, 266 U. S. 17 40
United States v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454 38
United States v. *Dixie Carriers, Inc., et al.*, Nos. 654–655, this Term 41
United States v. *Griffin*, 303 U. S. 226 22
United States v. *Interstate Commerce Commission*, 337 U. S. 426 22
United States v. *Los Angeles & S. L. R. R. Co.*, 273 U. S. 299 2
United States v. *Merchants etc. Assn.*, 242 U. S. 178 ..... 8, 27
United States v. *Pierce Auto Lines*, 327 U. S. 515 39
United States v. *Western Pacific R. Co.*, No. 18, this Term, decided December 3, 1956 43
Utah Fuel Co. v. *National Bituminous Coal Comm.*, 306 U. S. 56 28

Statutes:

Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001 et seq.:
Section 2 34
Section 4 34
Section 5 34
Section 6 35
Section 7 ..... 9, 34, 36
Section 8 ..... 2, 9, 33, 34, 35, 48
Section 10 ..... 2, 8, 28, 29, 30, 36, 48
Civil Aeronautics Act, 49 U. S. C. 642 (g) 14
Communications Act, 47 U. S. C. 204 14
Elkins Act, 49 U. S. C. 41, *et seq* 41
Federal Power Act, 49 Stat. 838:
Section 206 (16 U. S. C. 824e) 14
Section 313 (b) (16 U. S. C. 825l) 22

Statutes—Continued Page

Interstate Commerce Act, 24 Stat. 379, 49 U. S. C. 1 *et seq.*:
- Section 4 ..... 26, 27
- Section 6 (3) 2, 3, 12, 42, 45
- Section 13 (1) 2, 8, 26, 46
- Section 15 (1) 40, 43
- Section 15 (7) 2, 3, 6, 8, 13, 14, 18, 24, 26, 32, 35, 46
- Section 17 (2) 3, 14
- Section 216 14
- Section 217 14
- Section 306 14
- Section 397 14
- Section 405 14
- Section 406 14

Mann-Elkins Act, 36 Stat. 539 ..... 12, 18
Natural Gas Act, Section 4 (e), 15 U. S. C. 717c 7, 14, 24
Urgent Deficiencies Act (38 Stat. 219, 220), now 28 U. S. C. 1336, 1398, 2321–2325, 2284 ..... 2, 21

Miscellaneous:

69th Annual Report of the Interstate Commerce Commission, 1955, pp. 101–102 16
General Rules of Practice of the Interstate Commerce Commission, 49 C. F. R. 1.42 ..... 14, 15
Locklin, *Economics of Transportation* (1954), pp. 234–235 23
Report of the Board of Investigation and Research on *Practices and Procedures of Government Control*, House Doc. 678, 78th Cong., 2d Sess., pp. 96–98 17
Report of the Senate Judiciary Committee, Sen. Doc. 248, 79th Cong., 2d Sess., pp. 19, 20, 23, 84 ..... 29, 35
Sen. Rept. 355, 61st Cong., 2d Sess., p. 9 18
Special Rules of Practice of the Interstate Commerce Commission, 49 C. F. R. 1.200 15
20 F. R. 1465 15
50 Cong. Rec. 2151 34

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 224

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

AMARILLO-BORGER EXPRESS, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINION BELOW

The opinion of the District Court (R. 42) is reported in 138 F. Supp. 411. The pertinent orders of the Commission, dated September 23, 1955 (R. 4), and November 14, 1955 (R. 7), are not reported.

JURISDICTION

The judgment of the District Court was entered on January 24, 1956 (R. 59), and the notice of appeal by appellants United States and Interstate Commerce Commission was filed in that court on April 19, 1956 (R. 69). Probable jurisdiction was noted on October

8, 1956 (R. 71). 352 U. S. 817. The jurisdiction of this Court rests on 28 U. S. C. 1253 and 2101 (b).

STATUTES INVOLVED

Sections 6 (3), 13 (1), and 15 (7) of the Interstate Commerce Act (49 U. S. C. 6 (3), 13 (1) and 15 (7)), and Section 8 (b) and pertinent portions of Section 10 (e) of the Administrative Procedure Act (5 U. S. C. 1007 (b) and 1009 (e)), are set forth in the Appendix, *infra,* pages 45–49.

QUESTIONS PRESENTED

1. Whether a Commission order, issued pending a hearing and final decision on the lawfulness of newly filed rates, and vacating a prior order suspending such rates, is subject to judicial review.

2. Whether the Commission was required to make findings in support of an order vacating a prior rate suspension.

3. Whether a district court possesses power to enjoin the operation of rate schedules after they have gone into effect but prior to a final decision on their lawfulness by the Commission.

STATEMENT

This is a direct appeal from the judgment of a three-judge district court, convened under 28 U. S. C. 2321–2325 and 2284, setting aside an Interstate Commerce Commission order which vacated a prior order suspending certain rate schedules. A chronological statement of the proceedings before the Commission is of particular significance in this case.

THE SUSPENSION PROCEEDING BEFORE THE COMMISSION

On or about August 12, 1955, pursuant to the provisions of Section 6 (3) of the Interstate Commerce Act, southwestern and western trunk-line rail carriers filed with the Commission schedules of reduced rates and charges on carbon black [1] to become effective September 24, 1955. Acting under the provisions of Section 15 (7) of the Interstate Commerce Act, several motor carrier rate bureaus and a motor carrier filed with the Commission on September 8, 10, and 11, 1955, protests against the new rate schedules and petitioned that they be suspended. The rail carrier proponents of the new rates filed a reply on September 16, 1955.

The matter was referred to the Board of Suspension of the Commission [2] for initial action. On September 22, 1955, two days before the rates were to become effective, the Board voted to investigate, but not to suspend, the proposed new reduced rates.[3]

Thereafter, the parties protesting the new schedules immediately appealed to the Commission's Division 2,

[1] Carbon black, a by-product of natural gas, is produced principally in Texas and other Southwestern states. Primary consumers of carbon black are located in Ohio and other northern states.

[2] The Board of Suspension consists of five employees of the Commission duly constituted as a board pursuant to the provisions of Section 17 (2) of the Interstate Commerce Act for the purpose of taking initial action in the investigation and suspension of rates as provided by Section 15 (7) of the Interstate Commerce Act.

[3] The Commission at this time designated the proceedings as *Carbon Black—Southwest to U. S. A. and Canada*, Investigation and Suspension Docket No. 6476.

acting as an appellate division, which entered an order on September 23, 1955 (R. 4–6), suspending the proposed rate schedules "to and including April 23, 1956, unless otherwise ordered by this Commission," and continuing the order of investigation.

On October 14, 1955, the National Gas Products Association and the rail carriers filed petitions for reconsideration and vacation of the order suspending the rate schedules. Replies to the petitions were filed by the protesting parties.

By order entered November 14, 1955 (R. 7), the appellate division, after consideration of the petitions and replies, vacated the suspension as of November 24, 1955, for "good cause appearing," but directed that the investigation be continued "in full force and effect." A request for stay of the latter order was denied by the full Commission on November 23, 1955.

In the meantime, the Commission set the matter down for hearing and so notified the parties on November 1 and 16 and December 6, 1955.

THE PROCEEDING IN THE DISTRICT COURT

On November 23, 1955, one day before the rate schedules were to become effective under the terms of the order of November 14, 1955 (R. 7), appellees filed a complaint in the court below (R. 1–12) seeking to set aside that order. The complaint also requested a temporary restraining order for the purpose of preventing the rate schedules from going into effect.

The request for a temporary restraining order was denied by District Judge Atwell on the same day. (R. 12–13). On November 24, 1955, pursuant to the Com-

mission's order of November 14, the challenged rate schedules became effective.

On December 12, 1955, the parties were heard before the three-judge district court on appellee's application for an interlocutory injunction. Thereafter, on January 23, 1956, the court filed its opinion (R. 42–59) and on January 24, 1956, entered its judgment (R. 59–61).

The judgment granted a final injunction setting aside the Commission's order of November 14, 1955, as *"void, ab initio,"* remanding the matter to the Commission for further proceedings "as though the order of November 14, 1955, had never been entered," and prohibiting further use of the new rates (R. 61).

On February 21, 1956, the court denied appellants' motion for new trial (R. 66–67).

THE SUBSEQUENT PROCEEDING BEFORE THE COMMISSION

Hearings were held before an examiner of the Commission on February 2 and 3, 1956, at Dallas, Texas. On June 25, 1956, Division 2 found the proposed rates to be lawful. 298 I. C. C. 721. The Division stated in part (pp. 726–727):

> * * * Carriers are at liberty to initiate such rates as they deem wise, and the Commission is without power to interfere unless it appears that such rates violate some provision of the Interstate Commerce Act.
>
> Where, as here, the rates are on a level that is reasonably related to the level of the rates applicable on other commodities with similar transportation characteristics, and the earnings

> produced thereby leave no doubt of their compensatory nature, we do not feel called upon to interfere with the respondents' right to exercise their managerial discretion as to whether these rates are desirable to meet the needs of the industry or to forestall competition of other carriers. It is not the duty of any mode of transportation to maintain high rates for the sole benefit of another mode of transportation.

On November 19, 1956, the full Commission denied reconsideration. The appellees have not yet commenced any action to set aside the Commission's order.[4]

SUMMARY OF ARGUMENT

I

The Interstate Commerce Commission's exercise of its rate suspension powers under Section 15 (7) is not reviewable by the courts.

A. The language of Section 15 (7), providing that the Commission "may" suspend new railroad rates

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[4] In an earlier proceeding with respect to the reduced rates filed by the appellees, while the Commission found some lawful, it found others unlawful because they had been based on the "added traffic" theory. *Carbon Blacks, Southwest to Central and Midwest*, 66 M. C. C. 163. As yet, the appellees have not filed any action to set aside that order.

The Commission said at p. 171:

> * * * The foregoing rates are defended on the ground that they would improve the carriers' traffic balance. The desire to foster a more nearly balanced movement between eastbound and westbound traffic, however, is insufficient justification for rates which are below a compensatory level. * * *

As to the "added traffic" theory, see the Commission's prior decisions in, *e. g., Sugar from Colorado to Kansas and Missouri*, 18 M. C. C. 248, 250; *Leather from Middlesboro, Ky., to Chicago, Ill.*, 18 M. C. C. 265, 268; *Eggs and Poultry from Topeka, Kans., to Chicago, Ill.*, 53 M. C. C. 30, 32.

pending an investigation into their lawfulness, clearly indicates that the exercise of this power is entirely with the Commission's discretion. This is also shown by the legislative history of Section 15 (7). As this Court noted, in *Board of Railroad Commissioners* v. *Great Northern Ry. Co.*, 281 U. S. 412, 429, "This power of suspension was entrusted to the Commission only." Until the instant case, the lower Federal courts, in cases running from *M. C. Kiser Co.* v. *Central of Georgia Ry. Co.*, 236 Fed. 573 (S. D. Ga.), affirmed, 239 Fed. 718 (C. A. 5), to *National Water Carriers Ass'n.* v. *United States*, 126 F. Supp. 87 (S. D. N. Y.), have denied review of the Commission's exercise of this discretionary power.

B. The Commission's action in suspending or refusing to suspend rates, or in vacating its prior suspension order, is tentative and preliminary to a full investigation into the lawfulness of rates. Such action must be taken quickly and without a hearing upon the basis of informal materials submitted by the carrier and by protesting parties. The federal courts have never reviewed such preliminary, intermediate, and tentative orders of administrative agencies. *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375; *C. & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103, 112–113. In a series of recent cases, the Court of Appeals for the Fifth Circuit held that the Federal Power Commission's exercise of similar rate suspension powers under Section 4 (e) of the Natural Gas Act was too interlocutory in nature to be reviewed by the courts. *Humble Oil & Refining Co.* v. *Federal Power Commission*, 236 F. 2d 819

(and related cases), No. 530, this Term, certiorari denied, January 14, 1957.

C. The decision below is also erroneous in that it failed to require the appellees to exhaust their administrative remedies. In the instant case, there were available two remedies prescribed by Congress: the ensuing investigation instituted by the Commission under Section 15 (7), or the filing of a complaint with the Commission pursuant to Section 13. This Court has held that the administrative remedies afforded by Sections 13 and 15 must be followed by persons who challenge the Commission's rate actions and procedures. *United States* v. *Merchants &c. Ass'n.*, 242 U. S. 178, 188.

D. The court below erred in concluding that Section 10 of the Administrative Procedure Act makes reviewable the Commission's exercise of its rate suspension powers. This Court has held repeatedly that the provisions of Section 10 are subordinate to its introductory exceptions for cases where "(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—." *Ludecke* v. *Watkins*, 335 U. S. 160, 163–164; *Heikkila* v. *Barber*, 345 U. S. 229, 231–235. Thus, Section 10 of the Administrative Procedure Act excepts from review types of administrative action which Congress in other statutes, such as the rate suspension provisions of Section 15 (7), has entrusted solely to agency discretion.

Moreover, the provisions of Section 10 (c) of the Administrative Procedure Act specifically preserve the principle that courts will not review the "prelimi-

nary, procedural, or intermediate" orders of administrative agencies. As this Court concluded in *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 499–500, the Administrative Procedure Act "purports to strengthen, rather than to weaken, the principle requiring the exhaustion of administrative remedies before permitting court review."

II

On the merits, the court below set aside the Commission's order of November 14, 1955, on the ground that the order was not supported by sufficient findings. We submit, however, that no findings were required, and that in any event the order constituted sufficient notice of the Commission's action.

In connection with its decision as to findings, the court placed principal reliance on Section 8 (b) of the Administrative Procedure Act. However, Section 8 (b) by its very terms applies only "[i]n cases in which a hearing is required to be conducted in conformity with section 7 * * *." Unless "a hearing * * * conducted in conformity with section 7" is a prerequisite to Commission action granting or denying suspension, the Commission was not bound by Section 8 (b) in issuing its order of November 14, 1955. See *American Trucking Assns* v. *United States*, 344 U. S. 298. Since no hearing whatever is required in suspension cases—and certainly not "a hearing * * * conducted in conformity with section 7"—the requirements of Section 8 (b) of the Administrative Procedure Act are wholly inapplicable here.

The court below also relied on "the general law concerning the sufficiency of Commission action." According to the court, "administrative agencies must, in terms beyond the statutory rubric, reveal the basis for their action by which to judge whether it has met the elemental standards of our system and statutory requirements." 138 F. Supp. at 417. But this proposition, although of course true as applied to formal proceedings, rests on the assumption that the challenged administrative action is subject to judicial review; if there is no judicial review, obviously there is no need to make findings to facilitate judicial review. And, as we have argued *supra,* the Commission order challenged in this case is not subject to judicial review. Moreover, it is significant that each of the decisions cited in the opinion below as to "the general law concerning the sufficiency of Commission action" involved formal proceedings in which the requirement of making findings was unquestioned and the issue was instead the adequacy of those findings.

In any event, even assuming *arguendo* that the order vacating the suspension was reviewable and that it must "reveal the basis for [the Commission's] action by which to judge whether it has met the elemental standards of our system and statutory requirements", the order met that test. On its face, the order shows that the Commission was convinced, after study of the various briefs filed by the parties, that the suspension was unjustified and that it no longer had "reason to believe" that the rate schedules were unlawful. In short, on further reflection, the Commis-

sion granted the petitions for reconsideration of its prior order. In doing so, the Commission—no more than a court—was not under any obligation to give a detailed statement of its reasons.

III

The decision below establishes the further novel precedent of invalidating rates which have already gone into effect and while the Commission was still investigating their lawfulness.

In essence, the District Court undertook the making of rates which has been recognized universally as being beyond the scope of judicial power. Indeed, the court assumed a power that not even the Commission, the agency charged by Congress with the function of rate regulation, possesses—namely, the power to suspend rates after they had gone into effect but prior to a final decision on their lawfulness. If the decision below is permitted to stand, none of the thousands of carrier-made rates which become effective each year following the Commission's refusal to suspend could be relied upon as legal charges until they had been judicially tested.

ARGUMENT

PRELIMINARY STATEMENT

The practical and important consequences of the decision below can be appreciated only in the context of the rate-making procedures of the Interstate Commerce Act.

The Act contemplates that most rates will be estab-

lished on the carriers' initiative by filing with the Commission and publishing new tariffs. Under Section 6 (3), rail carriers may file tariffs embodying rate changes to become effective upon 30 days' notice to the Commission and to the public, unless the Commission, "in its discretion and for good cause shown", allows such changes to be made effective upon less than 30 days' notice.

Prior to 1910, the Commission could not, either upon a complaint filed under Section 13 or upon its own motion, prevent such railroad-initiated rates from becoming effective. The Commission could set aside such rates only after a full hearing. See *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557, 564–565.

Beginning with the Mann-Elkins Act of 1910, however, Congress has empowered the Commission to suspend railroad-initiated rates, before they become effective, for a specified period pending investigation by the Commission. Under the present law, the Commission may suspend such rates for a period not exceeding seven months. At the end of that period, the railroad may put the proposed rates into effect even though the Commission's investigation has not been completed.[5] As soon as the rates become effective, the carrier must observe them.

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[5] In its opinion, the court below makes the assumption that it is "the universal practice of all regulated carriers concerned to agree to the continuation of a suspension once issued." (R. 44) That this assumption is without substance is illustrated by the following facts resulting from an informal study of the tariffs filed by

In any event, the Commission does not make a final decision as to the lawfulness of proposed rates until it completes its formal hearing procedure. Thus, Section 15 (7) provides that, "pending such hearing," where new rates have been filed with the Commission:

> the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period * * *.

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the Middle West Motor Freight Bureau of Kansas City, Mo., to which the majority of the appellees are members. From the period July 1, 1954, to July 1, 1955, out of 37 tariffs suspended by the Commission, the effective date of the rates was postponed beyond the statutory period in only 14 instances, but in 23 cases the Bureau permitted the suspended rates to go into effect immediately after the seven-month statutory period while the investigations continued. As these facts show, the freezing of rates by motor carriers, or for that matter any carrier, is a wholly voluntary matter.

Section 15 (7) does not specify the circumstances in which the Commission is to suspend or not to suspend. The only stated condition is, in the event of a decision to suspend, "filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of [the Commission's] reasons for such suspension."

Similar rate-making and suspension provisions are found in Sections 216 and 217 (applicable to motor carriers), Sections 306 and 307 (applicable to water carriers) and Sections 405 and 406 (applicable to freight forwarders). In addition, rate suspension procedures, probably modelled upon the Interstate Commerce Act, are contained in the Civil Aeronautics Act (49 U. S. C. 642 (g), the Communications Act (47 U. S. C. 204), the Federal Power Act (16 U. S. C. 824e), and the Natural Gas Act (15 U. S. C. 717c).

Persons desiring to challenge the lawfulness of the proposed rates must file their protests and requests for suspension at least 12 days prior to the effective date of the intended rate changes. 49 C. F. R. 1.42. The matter is thereafter considered by the Board of Suspension, which consists of a board of five employees of the Commission, established pursuant to Section 17 (2) of the Interstate Commerce Act, 49 U. S. C. 17 (2), for the purpose of taking initial action.

Most suspensions of rates result from protests filed against such rates by shippers and competing carriers, rather than from the Commission acting *sua sponte*. Indicative of the informality of suspension proceedings are the Commission's rules dealing with

the content of such protests and the special rules of practice before the Board of Suspension. Rule 42 of the Commission's General Rules of Practice, 49 C. F. R. 1.42, merely requires that the protest should identify the publishing carrier, the tariff and schedules, and specific items protested, and "should state the grounds in support thereof, indicate in what respect the protested tariff or schedule is considered to be unlawful, and state what protestant offers by way of substitution." The rule provides that no protest shall include a prayer that it be considered a formal complaint. If the protestant intends to proceed further against a tariff which has not been suspended, then a separate formal complaint or petition must be filed.

The special rules of practice governing the procedure of the Board of Suspension, 49 C. F. R. 1.200, state in part: "The proceedings of the Board of Suspension * * * shall be informal. No transcription of such proceedings will be made. Subpoenas will not be issued and, except when applications or petitions are required to be attested [in the case of 4th Section applications], oaths will not be administered." These rules also set out the procedure for obtaining review of actions of the Suspension Board where it fails to suspend rates. Petitions may be filed with the Commission for reconsideration by the designated appellate division—*i. e.*, Division 2 (20 F. R. 1465). Such petitions must be filed at least two days prior to the effective date of the tariff.

The reason for such informality—apart from the fact that suspension proceedings represent but a preliminary step in the investigation of proposed rates—

is apparent from the number of suspension cases handled annually by the Commission. Thus, the exercise of the Commission's rate suspension powers is portrayed in its Sixty-Ninth Annual Report for the year ending October 31, 1955, pp. 101–102, as follows:

> A total of 4,019 protested rate adjustments involving changes in tariffs and schedules of rail, motor, water, freight forwarder, and express carriers were disposed of. Of these protested adjustments, 170 represented increases, 3,654 represented reductions, 152 represented both increases and reductions, and 43 represented neither increases nor reductions.
>
> The following action was taken upon the 4,019 protested adjustments:

Suspended in full	2,033
Suspended in part	84
Not suspended (permitted to become effective)	1,285
Otherwise disposed of (schedules rejected, protests withdrawn, protested schedules canceled, by carriers, et cetera)	617

> Of the 4,848 protests filed against the 4,019 adjustments disposed of during this period, a number were directed against more than one tariff publication, a number were joint protests of more than one party, and in many instances more than one request for suspension of the same tariff was filed. Among the protests were 24 from State Government agencies and two from Federal Government agencies.
>
> A total of 6,697 tariff publications were involved in the 4,019 adjustments disposed of. Of the total tariff publications involved, 475 reflected increases, 5,939 were reductions, 220 both increases and reductions, and 63 reflected no change.

This volume of suspension actions assumes significance in view of the speed required in the disposition of suspension matters. As noted above, the 30 day period of notice of newly filed rates usually is narrowed down to 12 days in which the Board of Suspension must decide whether or not to suspend proposed rates, and to two days in which Division 2 must decide whether to affirm or reverse the Board's decision. The necessity for rapid disposition of a large number of suspension matters has made it impossible to clothe suspension procedures or decisions with any of the formality that characterizes subsequent formal proceedings and decisions as to the lawfulness of proposed rates.[6]

I

THE INTERSTATE COMMERCE COMMISSION'S EXERCISE OF ITS RATE SUSPENSION POWERS IS NOT SUBJECT TO JUDICIAL REVIEW

We submit that the court below erred in asserting jurisdiction to review the Commission's action in vacating its prior rate suspension order. The power to suspend rates pending an investigation into their lawfulness is entrusted exclusively to the discretion of the Interstate Commerce Commission. Such tentative and preliminary administrative action in suspending or refusing to suspend rates is not subject to judicial review. These settled principles were preserved in the Administrative Procedure Act.

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[6] See also the description of rate suspension procedures in the report of the Board of Investigation and Research on *Practices and Procedures of Government Control*, House Doc. 678, 78th Cong., 2d Sess. (1944), pp. 96–98.

A. THE EXERCISE OF THE POWER TO SUSPEND RATES IS ENTRUSTED EXCLUSIVELY TO THE DISCRETION OF THE COMMISSION

Section 15 (7) of the Interstate Commerce Act provides that the Commission "may" suspend rail rates pending an investigation into the lawfulness of such rates. The use of the word "may" indicates that Congress left the exercise of this power to the discretion of the Commission. Moreover, the very nature of such a temporary suspension power, resembling the judicial power to preserve the status quo through stays and temporary restraining orders, strongly suggests that its exercise is entirely discretionary and in no way subject to judicial review. In any event, Congress did not leave this to inference, for the report of the Senate Committee on Interstate Commerce on the subsequently adopted Mann-Elkins legislation (Sen. Rep. 355, 61st Cong., 2d Sess., p. 9) states that, "at any time before the rate or classification would become effective, the commission should, *in its discretion,* be empowered, by order stating its reasons therefor, to postpone the effective date of such increase or classification for a reasonable period to enable it to investigate the proposed action" [emphasis supplied].

Prior to the instant case, so far as we can discover, the federal courts consistently refused to review the Commission's exercise of the rate suspension power. In the leading case of *M. C. Kiser Co.* v. *Central of Georgia Ry. Co.,* 236 Fed. 573 (S. D. Ga.), decided in 1916, only six years after the grant of the suspension power to the Commission, the court refused an injunction against the collection of new higher rates

pending an investigation into their lawfulness by the Commission, which had refused to suspend them. In so doing, the court characterized the suspension power as follows (pp. 577–578):

> The power, however, to temporarily suspend the operation of a new schedule, pending a full hearing as to its reasonableness by the Commission, is now lodged with the Interstate Commerce Commission. It was an act of wisdom on the part of Congress to vest such power in the Interstate Commerce Commission, because that body is the most competent of all tribunals to decide the question whether new rates should be so suspended or not. * * *
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> * * * * *
>
> * * * The power to suspend a proposed advance in rates, vested by the amendment of 1910 in the Commission, is an administrative function, and in this sphere the court is inclined to think that the Commission is supreme. At any rate, when the Commission has acted in such a matter, the court should not substitute its judgment for that of the Commission. The question as to whether the court should enjoin the rates pending a full hearing, or not, would necessarily to a great extent turn on the Commission's opinion as to the reasonableness or unreasonableness of the new rates. This court cannot decide that question. It is not within its power to decide it, but such power is vested in the Commission exclusively.

The court's decision was affirmed by the Court of Appeals for the Fifth Circuit on the ground "that the reasons given by the District Judge in 236 Fed. 573,

fully cover the points in the case and justify the conclusion reached." 239 Fed. 718.

While this Court has not passed upon the specific question, it was noted in *Board of Railroad Commissioners* v. *Great Northern Ry. Co.*, 281 U. S. 412, 429, that "This power of suspension was entrusted to the Commission only."

Subsequent decisions of the lower federal courts have been to the same effect. Thus, they have refused to review the Commission's refusal to suspend rates. *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E. D. Va., 1935); *Manhattan Transit Co.* v. *United States*, 24 F. Supp. 174 (D. Mass., 1938); *Carlsen* v. *United States*, 107 F. Supp. 398 (S. D. N. Y., 1952); *National Water Carriers Ass'n.* v. *United States*, 126 F. Supp. 87 (S. D. N. Y., 1954). Similarly, they have refused to review an order of the Commission vacating a prior suspension order. *Merchant Truckmen's Bureau of N. Y.* v. *United States*, 16 F. Supp. 998 (S. D. N. Y., 1936). The express rationale of these decisions is that the discretionary power to suspend rates is vested exclusively in the Commission and that the courts lack power to review the Commission's exercise of this discretionary power. See also Judge Davidson's opinion in *Ferguson-Steere Motor Company* v. *United States*, 126 F. Supp. 588 (N. D. Texas, 1954).[7]

[7] In the same case, involving an unsuccessful challenge of a Commission order suspending motor carrier rates, Judge Hutcheson declined to determine whether suspension orders were subject to any judicial review. Speaking for himself, however, he stated that "it is certainly true that the making of the orders is confided to the discretion of the Commission, and that only upon the closest

B. THE PRELIMINARY AND TENTATIVE NATURE OF SUSPENSION ORDERS PRECLUDES THEIR REVIEW BY THE COURTS

The jurisdiction of a three-judge district court "to enforce, enjoin, set aside, annual or suspend, in whole or in part, any order of the Interstate Commerce Commission," derives from the Urgent Deficiencies Act of 1913 (38 Stat. 219, 220), the pertinent provisions of which are now stated in 28 U. S. C. 1336, 1398, 2321–2325, and 2284. However, it is well-established that not all actions or "orders" of the Interstate Commerce Commission are reviewable by the courts. Thus, an "order" which placed a valuation upon a railroad's property but did not then require or prohibit action by the railroad, or determine any right or obligation, was held to be not an order reviewable under the Urgent Deficiencies Act. *United States* v. *Los Angeles & S. L. R. R. Co.*, 273 U. S. 299. Indeed, certain types of Commission orders, which are definitive in character in that they do determine rights and

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and most compelling showing that discretion was not exercised at all, or, if exercised, was abused, would a court interfere with a suspension order" (126 F. Supp. at 591).

In *Houston Fire and Casualty Insurance Co.* v. *United States* (Civil Action No. 2448, N. D. Tex., 1953) (three-judge court), Judge Hutcheson stated: "Under the prevailing doctrine, the courts have consistently held that jurisdiction to review orders of the Commission do not authorize review of preliminary or interlocutory action of the type involved in the case at bar [order of the Interstate Commerce Commission refusing to accept further certificates from insurance firm until furnished with statements satisfactorily explaining their financial transactions]. The reason for this is the requirement that the administrative remedies should be exhausted and administrative determination arrived at on the merits before resort to the court. This is especially true of investigative steps such as the one in this case, preliminary to a determination of the matter investigated."

obligations are not subject to judicial review. Thus, Commission orders denying shippers' claims for reparations (*United States* v. *Interstate Commerce Commission*, 337 U. S. 426) and determining the railroads' compensation for transportation of mail (*United States* v. *Griffin*, 303 U. S. 226) are not reviewable by three-judge district courts convened under the Urgent Deficiencies Act. Thus, the jurisdiction of such courts to review "any order of the Interstate Commerce Commission" is not to be read literally as all-inclusive, but as subject to general principles as to the kind of administrative action which is susceptible to judical review.

It is settled that the federal courts will not review preliminary, procedural or intermediate orders of administrative agencies, except to the extent that such orders create issues which may be determined in the judicial review of *final* administrative orders. Thus, *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, involved the provision of Section 313 (b) of the Federal Power Act that "Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals * * *." Holding that this language should not be construed to authorize review of preliminary or procedural orders, this Court held (p. 384) that "The provision for review thus relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings

appropriate to the case." Or, as stated in *C. & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103, 112–113, "administrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process."

As pointed out above (*supra*, pp. 11–17), the Commission's action in suspending or refusing to suspend rates, or in vacating a prior suspension order, is merely preliminary and incident to an investigation, which includes a full hearing, into the lawfulness of such rates. In addition, the Commission must act quickly, and it acts without a hearing upon the basis of untested written statements from interested persons. It must balance the possibility that the proposed rates will be found to be unlawful against the loss to the initiating carrier if the rates are suspended and later found lawful.[8] Such decisions are almost uniquely the product of experience and familiarity with the general rate structure, as distinguished from a result based upon evidence and findings. And such a preliminary conclusion is completely swallowed up by the Commission's later finding, after a hearing, as to whether the rates are lawful.

We know of no case, prior to the instant case, in which a federal court has undertaken to review such preliminary and tentative suspension actions of the Commission. Recently, unsuccessful attempts have been made to obtain judicial review of the Federal

[8] Locklin, *Economics of Transportation* (1954), pp. 234–235.

Power Commission's exercise of its rate suspension powers under Section 4 (e) of the Natural Gas Act (15 U. S. C. 717c (e)). On August 21, 1956, the Court of Appeals for the Fifth Circuit held in 16 related cases under the Natural Gas Act that various interlocutory orders of the Federal Power Commission are not reviewable. On January 14, 1957, this Court denied petitions for certiorari seeking review of the Fifth Circuit decisions.

Three of the 16 cases, namely, *Humble Oil & Refining Company* v. *Federal Power Commission,* 236 F. 2d 819, *Stanolind Oil & Gas Co.* v. *Federal Power Commission,* 236 F. 2d 824, and *Hunt Oil Company* v. *Federal Power Commission,* 236 F. 2d 828, involved orders of the Federal Power Commission suspending proposed natural gas rates. That Commission had acted pursuant to the rate suspension provisions of Section 4 (e), which are substantially the same as the rate suspension provisions of Section 15 (7) of the Interstate Commerce Act.[9] Starting with this Court's analysis in the *Metropolitan Edison* case, *supra,* the Fifth Circuit, in the *Humble Oil* case, held such suspension

[9] Section 4 (e) reads in pertinent part as follows:

> Whenever any such new schedule is filed the Commission shall have authority * * * to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect * * *.

orders to be unreviewable. In language equally applicable to the instant case, it explained its conclusion as follows (236 F. 2d., at 822–823):

> * * * the order in question is in no proper sense a definitive order. It is a mere procedural step taken at the inception of and not upon the completion of the administrative process. A realistic appraisal of the order and the function it performs demonstrates that it is interlocutory and that its issuance had but one objective in view, to maintain the status quo between seller and purchaser pending the exercise of the Commission's statutory jurisdiction to inquire into the reasonableness of the rate increase.
>
> * * * * *
>
> * * * What is really sought by petitioner is that this Court should halt inquiry at the threshhold in order to rule *in limine* upon the propriety of the Commission's action and whether it should proceed further. It may be desirable that the law should provide for a preliminary judicial review of questions of this kind, but in the absence of such a provision we cannot assume that power. * * * The conclusion we have reached that this Court has no jurisdiction to review the suspension order at this time, renders it both inappropriate and unnecessary to pass upon the contentions * * * that the Commission failed to state "reasons" for such suspension as required by the Act, and that the order is contrary to the Natural Gas Act and violates petitioner's rights under the Fifth Amendment to the Constitution of the United States. * * *.

On the basis of the same reasoning, the decision below cannot be sustained.

C. THE APPELLEES SHOULD HAVE BEEN REQUIRED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES

The discretionary and preliminary character of the Commission's exercise of its rate suspension powers is emphasized by the fact that the Interstate Commerce Act provides full and adequate administrative remedies for shippers and competing carriers who consider themselves aggrieved by new rates initiated by a carrier.

The court below held that there was "no further administrative machinery or procedure available—much less to be exhausted." However, to the contrary, there were open to the appellees two avenues of administrative relief prescribed by Congress. First, they could have pursued their remedy under Section 15; the hearings in this proceeding took place on February 2–3, 1956, and the Commission issued its final order in the matter on June 25, 1956, about five months after the decree below. Or, second, if the Commission had not instituted an investigation under Section 15, the appellees could have filed a formal complaint under Section 13 of the Interstate Commerce Act, in which case the Commission would have been required to conduct an investigation into the alleged unlawfulness of the rates.

It is worth repeating that, with the single exception of the long-and-short-haul provisions of Section 4, the Interstate Commerce Act preserves the right of carriers to initiate rates. The rates so initiated

by carriers may be set aside by the Commission only after a full hearing, instituted by the Commission upon complaint or its own motion. When, in 1910, Congress first empowered the Commission to suspend rates for a limited period pending such investigation, there was not the slightest suggestion that this ancillary power was to displace the investigation and complaint procedures of Section 13 and 15 as the basic administrative remedies against unlawful rates.

We shall not attempt to catalogue the cases in which this Court, despite every conceivable allegation of injury, has required the exhaustion of administrative remedies prescribed by Congress. *See, e. g., Director General of Railroads et al.* v. *The Viscose Company,* 254 U. S. 498, 502–503, and cases cited therein; *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41, 50–51; *Macauley* v. *Waterman Steamship Corp.,* 327 U. S. 540, 544–545; *Holmes et al.* v. *United States,* 89 F. Supp. 894 (S. D. N. Y., 1949), affirmed, 339 U. S. 927. See also *Shannahan* v. *United States,* 303 U. S. 596; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125; *Federal Power Commission* v. *Hope Gas Co.,* 320 U. S. 591. It is sufficient here to point out that this Court long ago held that the remedies afforded by Sections 13 and 15 of the Interstate Commerce Act must be followed before judicial remedies may be invoked. Thus, in *United States* v. *Merchants, etc. Ass'n.,* 242 U. S. 178, 188, where intermediate communities sought to challenge an order of the Commission granting relief from the long-and-short-haul provisions of Section 4, this Court held that such an

order was not reviewable, pointing out that "if the rates made by tariffs filed under [the Section 4 relief granted to the railroads] seem to [the communities] unreasonable, or unjustly discriminatory, Sections 13 and 15 afford ample remedy." And the Court added that "To permit communities or shippers to seek redress for such grievances in the courts would invade and often nullify the administrative authority vested in the Commission."

Thus, the decision below was further erroneous in that it failed to relegate the appellees to the administrative remedies afforded by Congress in Sections 13 and 15.[10]

D. THE COMMISSION'S EXERCISE OF ITS SUSPENSION POWERS IS NOT MADE REVIEWABLE BY SECTION 10 OF THE ADMINISTRATIVE PROCEDURE ACT

The court below refused to apply these established principles, as to the reviewability of discretionary and preliminary agency action and the exhaustion of administrative remedies, because it considered that Section 10 of the Administrative Procedure Act subjected to judicial review the Commission's exercise of its rate suspension powers. Thus, it stated that "the exercise of discretion, the making of judgments, and the issuance of sanctions * * * upon the basis of administrative expertise are precisely the matters which Congress in this important legislation intended

[10] The failure of the court below to require exhaustion of administrative remedies finds no support in the authorities which it cited: *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 306 U. S. 56; *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (C. A. D. C.); and the opinion of Mr. Justice Douglas as Circuit Justice in *Stanard* v. *Olesen*, 98 L. Ed. 1151.

should be under, not exempt from, the Administrative Procedure Act" (R. 53). We submit that the lower court has misread the Administrative Procedure Act.

The provisions of Section 10 of the Administrative Procedure Act, dealing with judicial review, are prefaced by the words, "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—." This Court has held repeatedly that all of the provisions of Section 10 are qualified by these introductory exceptions. *Ludecke* v. *Watkins,* 335 U. S. 160, 163–164; *Heikkila* v. *Barber,* 345 U. S. 229, 231–235; *Federal Power Commission* v. *Colorado Interstate Gas Co.,* 348 U. S. 492, 500–501. While these cases dealt specifically with the exempting circumstance that "statutes preclude judicial review," they are equally applicable when "agency action is by law committed to agency discretion."[11] Since, as we have shown, Congress entrusted the rate suspension power to the full discretion of the Commission, it follows that nothing in Section 10 subjects the exercise of that power to judicial review.

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[11] It is clear that the sponsors of the Administrative Procedure Act were fully aware that there were types of discretionary administrative action which, as a practical matter, could not be subjected to judicial review. Thus, Mr. Carl McFarland, testifying before the House Committee on the Judiciary in 1945 on the pending administrative procedure bill (Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 84), stated that:

> * * * we do not believe the principle of review or the extent of review can or should be greatly altered. We think that the basic exception of administrative discretion should be preserved, must be preserved. We believe that * * * the scope of review should be as it now is.

Moreover, it is equally clear that nothing in Section 10 of the Administrative Procedure Act was intended to abrogate the requirement of exhaustion of administrative remedies. Thus, Section 10 (c) expressly provides that:

> Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. * * *

The quoted language simply means that, unless Congress provides otherwise, "preliminary, procedural, or intermediate agency action" is reviewable only upon the review of final administrative action. As this Court has observed, in *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. at 499–500, "[the Administrative Procedure] Act purports to strengthen, rather than to weaken, the principle requiring the exhaustion of administrative remedies before permitting court review." This principle, it may be noted, was applied by the Court of Appeals for the Fifth Circuit in *Magnolia Petroleum Co.* v. *Federal Power Commission*, 236 F. 2d 785, 793, No. 558, this Term, certiorari denied, January 14, 1957, one of the 16 cases under the Natural Gas Act referred to above.

Accordingly, we submit that the court below erred in finding in the Administrative Procedure Act a purpose to subject to judicial review the discretionary, preliminary, and tentative decisions of the Interstate

Commerce Commission in exercising its rate suspension powers under Section 15 (7) of the Interstate Commerce Act.

II

THE COMMISSION, IN VACATING THE PRIOR SUSPENSION ORDER, WAS NOT REQUIRED TO MAKE DETAILED FINDINGS

On the merits, the court below held that the Commission's order vacating the prior suspension order was defective for lack of adequate findings. We submit, however, that no findings were required, and that in any event the Commission's notice of its action vacating the suspension was sufficient.

The Commission's suspension order of September 23, 1955, stated in part (R. 5–6):

> * * * there is reason to believe that they [the proposed rate schedules] would, if permitted to become effective, result in rates and charges, * * * which would be unjust and unreasonable in violation of the Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy * * *.

This order, suspending the proposed rail rates, was vacated by the Commission's order of November 14, which contained the following statement (R. 7):

> *It further appearing,* That consideration has been given to petitions of the respondents requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor:

The District Court held that the last quoted statement was legally insufficient to support a vacation of the prior suspension.

At the outset, it should be noted that Section 15 (7) requires the Commission to state reasons only when it suspends rates; it does not require reasons when the Commission refuses to suspend. Thus, if the Commission had originally denied the appellee's application for suspension relief, presumably no one would contend that the Commission was under an obligation to state its reasons for doing so. Any such contention would ignore the distinction drawn in the statute between the grant and the denial of suspension relief—a distinction which reflects Congressional recognition of the traditional right of carriers to initiate their own rates.[11a] Yet, for all practical purposes, an order vacating a prior suspension order is the same as an initial refusal to suspend. In both instances, the effect is to deny suspension

[11a] Moreover, if findings were essential whenever the Commission denied suspension relief, the effectiveness of the suspension procedure would be seriously impaired. (See *supra*, pp. 11–17.) Applied to 4,000 suspension proceedings annually, such a requirement would create a heavy burden in the drafting of such reasons or findings, a burden entirely out of proportion to the tentative character of the Commission's decisions in suspension matters. *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, 689. There is the further danger that the imposition of such a requirement might well force the Commission toward unconscious prejudgment of issues which would be presented to it later after a hearing in related investigation or complaint proceedings. Cf. *Accardi* v. *Shaughnessy*, 347 U. S. 260.

relief.[12] There would appear to be no substantial basis for differentiating between the two types of orders with respect to the requirement of findings. Thus, in the present case, there is no reason for a stricter standard as to the order vacating suspension relief merely because of the statement appearing in the prior suspension order to the effect that "there [is] reason to believe * * *" certain infirmities exist in the new rate schedules. This statement was necessarily withdrawn by the vacating order, the very purpose of which was to rescind the prior suspension order and hence any premise it was based upon. To suggest, as the court below did (R. 49–50), that the Commission may have vacated the suspension while still having "reason to believe" the rate schedules were unlawful, is to impute to the Commission a deliberate disregard of its duties.

In setting aside the Commission's order, the court below placed heavy reliance upon Section 8 (b) of the Administrative Procedure Act, which requires full and formal findings of fact and conclusions of law. However, Section 8 applies, by its express terms, only "In cases in which a hearing is required to be conducted in conformity with section 7" of the Admin-

[12] As the chronology of this case suggests, a vacation of a prior suspension order may often be the equivalent of an initial refusal to suspend. Here the proposed rates were to become effective on September 24; the Board of Suspension refused to suspend on September 22; on appeal, Division 2 suspended the rates on September 23. It seems likely that in this and many other cases with a similar chronology the Division has opportunity to make a considered judgment only after its initial action to suspend and the submission of additional information in the petitions.

istrative Procedure Act. And this Court has recently so held. *American Trucking Assns.* v. *United States*, 344 U. S. 298, 319–320. Section 7, in turn, applies only to "hearings which section 4 or 5 requires to be conducted pursuant to this section." Section 5 is inapplicable because it relates to "adjudication," whereas rate-making is classified under Section 2 (c) as "rule making."[13] And Section 4, which relates to "rule making," requires "a hearing * * * in conformity with section 7" only "[w]here rules are required by statute to be made on the record after opportunity for an agency hearing * * *."[14]

[13] Section 2 (c), referring to "Rule and Rule Making," states in pertinent part:

> "Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and *includes the approval or prescription for the future of rates* * * *. [Emphasis supplied.]

As regards the applicability of Section 8 to suspension proceedings, however, the same result would follow even if the Commission's orders in such proceedings were classified as "adjudication" (covered by Section 5) rather than "rule making" (covered by Section 4). For Section 5 is applicable only in cases "of adjudication required by statute to be determined on the record after opportunity for an agency hearing * * *."

[14] The legislative history of the Administrative Procedure Act is in accord. Thus, Senator McCarran, in discussing the bill on the Senate floor, stated, with respect to rule making, that

> * * * *No hearings are required by the bill unless statutes already do so in a particular case. Similarly, in adjudications—that is, the judicial function—no agency hearings are required unless statutes already do so, but in the latter case the mode of hearing and decision is prescribed.* Where existing statutes require that either general regulations—which the bill calls rules—or particularized adjudications—which the bill calls orders—shall be made after agency hearing or opportunity for such hearing, then section 7 of the bill spells out

Plainly, there is no statutory requirement that the grant or denial of suspension relief "be determined on the record after opportunity for an agency hearing * * *." On the contrary, the only hearing required by Section 15 (7) of the Interstate Commerce Act is the formal hearing on the reasonableness of the new rates in the event that the Commission undertakes an investigation; the Commission's power to suspend the new rates is, under the statute, to be exercised "*pending* such hearing" (emphasis supplied). Nor is a hearing on suspension matters constitutionally required. As this Court held in *Ewing* v. *Mytinger & Casselberry*, 339 U. S. 594, 598: "We have repeatedly held that no hearing at the preliminary stage is required by due process so long as the requisite hearing is held before the final administrative order becomes effective." Therefore, since no hearing is required in suspension matters (and certainly not "a hearing * * * in conformity with section 7"), the requirements of Section 8 (b) of the Administrative Procedure Act are wholly inapplicable here.[14a]

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the minimum requirements for such hearings; section 8 states how decisions shall be made thereafter * * *. [92 Cong. Rec. 2151.] [Emphasis supplied.]

See also Report of the Senate Judiciary Committee, S. Doc. No. 248, 79th Cong., 2d Sess., pp. 19, 20, 23.

[14a] It should be noted that Section 6 (d) of the Administrative Procedure Act, 5 U. S. C. 1005 (d), also has no application here. Section 6 (d) states:

> Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the

A parallel problem was presented in *American Trucking Assns.* v. *United States, supra.* There it was contended that the Commission, in promulgating motor-carrier leasing regulations (also "rule making" as here), had failed to comply with the provisions of Sections 7 and 8 of the Administrative Procedure Act. This Court stated (pp. 319–320):

> * * * For § 7 of the Administrative Procedure Act is limited by its own terms to "hearings which section 4 or 5 requires to be conducted pursuant to this section." Turning to those sections, it is found that they invoke § 7 only when specified by statute: "Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection." In short, § 7 applies only when hearings were required by the statute under which they were conducted to be made on the record and with opportunity for oral hearing. As we have pointed out, the rule-making authority in the instant case stems from § 204 (a) (6) of the Motor Carrier Act; nothing there requires record or hearing * * *.

The Court then went on to say (p. 320):

> Similar reasoning supports our conclusion that § 8 (b) of the Administrative Procedure

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denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds.

The ICC order set aside by the court below is an order *granting* a petition to vacate a prior suspension order rather than one denying the relief sought. Moreover, even assuming that Section 6 (d) were applicable, all that it requires is a "simple statement" of grounds and none where the denial is self-explanatory.

> Act, which requires that decisions shall "include a statement of (1) findings and conclusions," invoked by appellants in No. 26, is likewise inapplicable. *For it, in turn, is limited to a "hearing * * * required to be conducted in conformity with section 7."* [Emphasis supplied.]

The rationale of the *American Trucking Ass'n* case was subsequently applied by the Court of Appeals for the Second Circuit in *Air Line Pilots Ass'n, Internat'l* v. *Civil Aeronautics Board,* 215 F. 2d 122, in an opinion by Mr. Justice (then Circuit Judge) Harlan. See also *Eastern Airlines* v. *Civil Aeronautics Bd.,* 185 F. 2d 426, 427–428 (C. A. D. C.); *Cook Cleland Catalina Airways* v. *Civil Aeronautics Bd.,* 195 F. 2d 206, 207 (C. A. D. C.); and *Kenny* v. *United States,* 103 F. Supp. 971 (D. N. J.).

In addition to Section 8 of the Administrative Procedure Act, the court below also relied on "the general law concerning the sufficiency of Commission action" (R. 54). According to the court, "administrative agencies must, in terms beyond the statutory rubric, reveal the basis for their action by which to judge whether it has met the elemental standards of our system and statutory requirements" (R. 51–52). But this proposition, although of course true as applied to formal proceedings, rests on the assumption that the challenged administrative action is subject to judicial review; if there is no judicial review, obviously there can be no need to make findings to facilitate judicial review. Cf. *Federal Power Commission* v. *Metropolitan Edison Co.,* 304 U. S. 375, 383. As we have shown (*supra,* pp. 17–31), the Commission's order challenged

in this case is not subject to judicial review. In this connection, it is significant that each of the decisions cited in the opinion below (R. 52) [15] as to the "general law concerning the sufficiency of the Commission action" involved formal proceedings in which the requirement of making findings was unquestioned and the issue was instead the adequacy of the proposed findings.

Moreover, even assuming *arguendo* that the order vacating the supension was reviewable, the order did in fact meet the test laid down by the court below—*i. e.*, that it must "reveal the basis for [the Commission's] action by which to judge whether it has met the elemental standards of our system and statutory requirements." On its face, the order shows that the Commission was convinced, after study of the various briefs filed by the parties and for "good cause appearing," that the suspension was unjustified and that it no longer had "reason to believe" the new rate schedules were unlawful. In short, on further reflection, the Commission granted the petitions for reconsideration of its prior order. In doing so, the Commission—no more than a court—was not under any

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[15] *State of Florida* v. *United States*, 282 U. S. 194; *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, 465; *Alabama G. S. R. Co.* v. *United States*, 340 U. S. 216, 224; *Cantlay & Tanzola* v. *United States*, 115 F. Supp. 72 (S. D. Calif.); *North Carolina* v. *United States*, 325 U. S. 507; *Atlanta and St. Andrews Bay Railway Co.* v. *United States*, 104 F. Supp. 193 (M. D. Ala.); *Pacific Inland Tariff Bureau* v. *United States*, 129 F. Supp. 472 (D. Oreg.).

obligation to give a detailed statement of its reasons.[16] For such petitions are addressed to the sound discretion of the Commission. See *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 517; *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 535. Particularly is this so in the instant case where, as we have shown (*supra*, pp. 11–17), the administrative proceedings in suspension matters are conducted on an informal basis and do not even include hearings. The appellees acquired no such vested interest in the suspension order as would entitle them to a detailed statement of reasons when the order was subsequently retracted by the Commission on the basis of fuller information.

III

THE DISTRICT COURT WAS WITHOUT POWER TO ENJOIN THE OPERATION OF RATES ALREADY IN EFFECT

Perhaps the most startling aspect of the decision below is the relief granted by the court. After denying the temporary restraining order sought by the appellees and thus permitting the new rate schedules

[16] Cf. statement of Chief Judge Parker of the Fourth Circuit in a case involving the Commission's denial of rehearing: "To one who has denied many petitions for rehearing and seldom given a reason therefor, it comes as a matter of mild surprise that anyone should think it incumbent on a court or commission to give reasons for denying [such] a petition * * *." *Carolina Scenic Coach Lines* v. *United States*, 59 F. Supp. 336, 337 (W. D. N. C.), affirmed 326 U. S. 680.

to go into effect,[17] the court below enjoined their continued operation even while the Commission was investigating their lawfulness under Section 15 (1) of the Interstate Commerce Act. The court further declared (R. 58) that "the matter is remitted to the situation existing immediately prior to" the suspension order.

In essence, the District Court undertook the making of rates, which has been recognized universally as being beyond the scope of judicial power. *E. g., Peik* v. *Chicago N. W. R. Co.*, 94 U. S. 164; *Reagan* v. *Farmers' Loan & T. Co.*, 154 U. S. 362; *Simpson* v. *Shepard* (Minnesota Rate Cases), 230 U. S. 352; *Louisville & N. R. Co.* v. *Garrett*, 231 U. S. 298; *Loomis* v. *Lehigh Valley R. Co.*, 240 U. S. 43; *Terminal R. Assn.* v. *United States*, 266 U. S. 17; cf. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 144. Indeed, the court assumed a power that not even the Commission, the agency charged by Congress with the function of rate regulation, possesses—namely, the power to suspend rates after they have gone into effect but prior to a final decision on their lawfulness. If the decision below is permitted to stand, none of the thousands of carrier-made rates which become effective each year after the Commission's refusal to suspend could be relied upon

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[17] The appellees were aware of this problem. In their complaint, in connection with their unsuccessful request for a temporary restraining order, they alleged: "Once the schedule becomes effective there is considerable doubt whether even a subsequent setting aside of the Commission's order could, in law, have the effect of cancelling the schedules." (R. 10.)

as legal charges until they had been judicially tested.[18]

The instant case illustrates the confusion and inconsistencies that may stem from such a far-reaching doctrine. The District Court's judgment, entered January 24, 1956, sets aside as *"void, ab initio"* the Commission's order of November 14, 1955, permitting the new rates to go into effect. The judgment also remands the case to the Commission for further proceedings "as though the order of [November 14, 1955] had never been made" (R. 59). The result, under the judgment, is that for over nine weeks the rail carriers collected freight charges below the "legal" rate. If so, these carriers are now presumably obligated under the Elkins Act, 49 U. S. C. 41 *et seq.*, to recover from their shippers the undercharges[19]—that

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[18] Apparently, under the rationale of the decision below, not even the expiration of the seven-month suspension period would permit reliance on published rates. In a companion case, Nos. 654–655, this Term, *United States et al.* v. *Dixie Carriers, Inc., et al.*, a three-judge district court (also per Circuit Judge Brown) issued a similar injunction *after* expiration of the seven-month period.

[19] On the basis of the undercharges alone, the instant case involves a continuing controversy, even though the statutory seven-months suspension period has expired. Moreover, it is not clear whether the injunction issued by the court below was intended to extend beyond the seven-months period. See note 18, *supra*.

In addition, this Court has held that the public interest requires review in cases of this type regardless of the expiration of the particular order. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 514, 516. The latter case involved a suit to enjoin an ICC order requiring a rail carrier to cease and desist from discriminating in favor of a particular shipper and against all others. On expiration of the ICC order, the rail carrier contended that the matter was moot, and moved to

is, the difference between the charges actually paid and the higher rate previously in force—even though the Commission has now determined that the rates are lawful (see *supra,* pp. 5–6) and even though the particular shipments perhaps would not have been made at the higher rate. On the other hand, during the nine-week period in question, the rail carriers were forbidden under Section 6 (7) of the Interstate Commerce Act to charge one cent more (or less) "than the rates, fares, and charges which are specified in the tariff filed and in effect at the time * * *." Thus, the court below held illegal precisely what the Act required. Moreover, the physical impossibility of resurrecting "the situation existing immediately prior to" the suspension order is emphasized by the fact

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dismiss the appeal. In denying the motion, this Court held (pp. 515–516):

> * * * The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review * * *.

Relying on this principle, this Court in *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, stated (p. 452):

> * * * It is claimed at bar that the questions arising for decision are moot, since in consequence of the lapse of more than two years since the order of the Commission became effective, by operation of law the order of the Commission has spent its force, and therefore the question for decision is moot. The contention is disposed of by *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, this day decided, *post*, p. 498. * * *

that some of the tariffs supplanted by the new rate schedules expired by their own terms on December 31, 1955, even prior to the court's decision (R. 58).

The statutory scheme shows, we submit, that the injunction granted by the court below was beyond its jurisdiction, even assuming *arguendo* that the Commission's order vacating the suspension was otherwise reviewable. Once the new rates were permitted to go into effect, the court was without power to pass on their validity except on judicial review of a final Commission order entered after a full investigation and hearing under Section 15 (1). Prior to such an order, as already pointed out, the Commission itself is without power to suspend rates already in effect. A reviewing court can exercise no greater power; for, as this Court has recently emphasized, the regulation of rates is preeminently a matter within the Commission's primary jurisdiction. *United States* v. *Western Pacific R. Co.*, No. 18, this Term, decided on December 3, 1956.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

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JANUARY, 1957.

APPENDIX

The pertinent provisions of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1, *et seq.*, are as follows:

SEC. 6 (3)

No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided,* That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further,* That the Commission is hereby authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges or classifications not changed if, in its

judgment, not inconsistent with the public interest.

SEC. 13 (1)

That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

SEC. 15 (7)

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders with-

out answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such supension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory pro-

vision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

The pertinent provisions of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1 *et seq.*, are as follows:

SEC. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

* * * * *

(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

* * * * *

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by sta - ute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

* * * * *

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts

to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

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In the

Supreme Court of the United States

OCTOBER TERM, 1956

No. 125

ARKANSAS & LOUISIANA MISSOURI RAILWAY COMPANY; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; GULF, COLORADO AND SANTA FE RAILWAY COMPANY, *et al.*,

Appellants,

v.

AMARILLO-BORGER EXPRESS, INC., *et al.*

Appellees.

No. 224

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellants,

v.

AMARILLO-BORGER EXPRESS, INC., *et al.*

Appellees.

Appeals from the United States District Court for the Northern District of Texas

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BRIEF FOR THE APPELLEES

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INDEX

	Page
Questions Presented	1-3
Statement	3-10
Summary of Argument	10-18
Argument:	
I. There is now no justiciable controversy	18-22
II. The Order of the Commission is Reviewable: Preliminary Statement	22-23
A. The order possesses requisites of finality	23-27
B. A discretionary order is subject to review for abuse of discretion	28-35
III. The District Court correctly held that Order was arbitrary and an abuse of discretion	35-42
IV. The District Court correctly enjoined use of rates published in violation of suspension order	43-48
Conclusion	48
Proof of Service	49

Page

Cases

Amalgamated Association v. Wisconsin Employment Relations Board, 340 U. S. 416 ..... 11, 19

Aetna Life Insurance Co. v. Haworth, 300 U. S. 239 22

Atlantic Seaboard Corp. v. Federal Power Commission, 201 Fed. 2d 568 30

Arenas v. United States, 322 U. S. 419 32

American Federation of Musicians v. Stein, 213 Fed. 2d 679 37

Boise City Irrigation and Land Company v. Clark, 131 Fed. 415 ..... 11, 19, 20

Carbon Black From the Southwest to the United States and Canada, 298 I. C. C. 721 9

Columbia Broadcasting System v. United States, 316 U. S. 407 ..... 12, 24, 32

California v. San Pablo T. & R. Co., 149 U. S. 308, 314 ..... 19, 21

Carbon Black From Southwest to Central and Midwest, 66 M. C. C. 163 5

Cantlay & Tanzola v. United States, 115 F. Supp. 72 27

Doremus v. Board of Education, 342 U. S. 429 19

Humble Oil and Refining Co. v. Federal Power Commission, 236 Fed. 2d 819 ..... 29, 30

Huber Baking Co. v. Storehmann Brothers, 208 Fed. 2d 464 37

Home Decorators, Inc. v. Herfort, 179 Fed. 2d 398 37

Interstate Commerce Commission v. Illinois Central R. Co., 215 U. S. 452 ..... 13, 31

Isbrandtsen Co. v. United States, 211 Fed. 2d 51 27

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123 (Footnote 4) 12, 24

Page

Lynch v. United States, 292 U. S. 571 32

Phillips Petroleum Co. v. Federal Power Commission, 227 Fed. 2d 470 ..... 27, 30

Pacific Inland Tariff Bureau v. United States, 129 F. Supp. 472, 134 F. Supp. 210 27

Riss v. United States, 96 F. Supp. 452 ..... 16, 42

Riss v. United States, 341 U. S. 907 ..... 17, 42

Ripley v. United States, 223 U. S. 695 30

Southern Pacific Terminal Co. v. I. C. C., 219 U. S. 498 ..... 10, 11, 19, 21

State of Florida v. United States, 282 U. S. 194 ..... 16, 41

St. Pierre v. United States, 319 U. S. 41 19

United States v. Trans-Missouri Freight Association, 166 U. S. 290 ..... 11, 19, 20, 21

United States v. Hamburg-Amerikanische, 239 U. S. 466 ..... 11, 19, 20, 21

United States v. Alaska Steamship Co., et al., 253 U. S. 113 ..... 11, 19

United States v. Prince Line, 220 Fed. 230 20

United States v. Interstate Commerce Commission, 337 U. S. 426 ..... 28, 31

Utah Fuel Co. v. National Bituminous Coal Commission, 306 U. S. 56 ..... 11, 23, 25, 26

Utah Fuel Co. v. National Bituminous Coal Commission, 101 Fed. 2d 426 25

Western Electric Company v. Cinema Supplies, 80 Fed. 2d 106 ..... 15, 38

Wong Yang Sung v. McGrath, 339 U. S. 33 42

Page

Statutes

Administrative Procedure Act:
Section 8 ..... 16, 42
Section 10 ..... 13, 14, 33, 34, 42
Interstate Commerce Act:
Section 6(3) 9, 17, 18, 45
Section 15(7) 8, 29, 36, 39

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Appeals from the United States District Court for the Northern District of Texas

---

BRIEF FOR THE APPELLEES

THE QUESTIONS PRESENTED

Being dissatisfied with the questions presented by the Appellants, the Appellees submit the following:

1. The Interstate Commerce Commission entered an admittedly valid suspension order. Thereafter it attempted

to vacate it, but the District Court held that such attempt was ineffectual, and that the suspension order, despite such attempt, was still in effect. Subsequently, the suspension order expired by its own terms. Still later the Commission entered its final order discontinuing the entire proceedings, so that nothing is now pending. This appeal challenges only the correctness of the holding of the District Court. Under these circumstances, does there exist a justiciable controversy?

2. Whether, in vacating a suspension order which it had theretofore validly issued, the action of the Interstate Commerce Commission, though arbitrary, capricious and causing immediate, severe and irreparable damage, is, nevertheless, totally exempt from judicial scrutiny, even for the abuse of discretion.

3. In the exercise of its functions pursuant to Section 15(7) Part I, Interstate Commerce Act, the Interstate Commerce Commission, upon express fact findings of probable unlawfulness, suspended a new rate schedule pending investigation. Thereafter, and though leaving in force the facts so found, it attempted to set aside the suspension order, without assigning any reason therefor. Was such subsequent action arbitrary, capricious and an abuse of the discretion given to the Commission?

4. A proposed rate schedule was suspended by the Interstate Commerce Commission for a period of seven months. Fifty days later a new schedule containing the same rates was filed in contravention of the suspension order, upon

the excuse that a void order had attempted to vacate the suspension. Is the Court, although finding that the suspension order had at all times been in effect, nevertheless, powerless to enjoin the use of the rate schedule filed in contravention of the valid suspension order?

STATEMENT

This case involves separate appeals by the two sets of Appellants from a final judgment of the United States District Court for the Northern District of Texas, the Court being composed of three Judges (R. 67-69). Probable jurisdiction was noted on October 8, 1956, the separate appeals being then consolidated (R. 71).

At the time this proceeding was heard by the three Judge Court below, the issue presented was of considerable importance to the Appellees. The question then was whether the Commission having found the existence of a state of facts which compelled it, in the exercise of sound discretion, to suspend a competitive rate schedule so as to preserve the status quo during the period of investigation, the Commission could, nevertheless, withdraw the relief to which its reiterated findings revealed that the Appellees were entitled to receive.

The admittedly valid order of the Commission (which the Court below found was still in effect) expired by its own terms sixty days after the judgment of the Court below was pronounced. Thereafter, the Commission com-

pleted its investigation in short order and the entire Commission proceedings have been discontinued (298 I. C. C. 721).

The issues therefore, important as they were at the time of the trial in the Court below, are important now only in the academic sense. Except as a possible guide to future conduct, neither the railroad Appellants, the Government, the Commission, nor these Appellees have anything either to gain or lose, no matter what the decision of this Court may be.

The subject matter out of which the controversy arose was carbon black and the freight rates applicable thereto.

Carbon black is an important product of natural gas. The principal production is in the southwestern part of the United States, Texas being a leading producer. The principal consumers are the automobile tire manufacturers, and one of the chief and typical consuming points is Akron, Ohio (R. 43).

Transportation of carbon black by motor carriers (the Appellees) is important to them as it furnishes a substantial tonnage for movement from the Southwest to the Ohio area, which would otherwise be a dead haul since the predominant long haul motor carrier traffic moves to the Southwest. Until 1954 the rates were on a substantial parity between rail and motor carriers (R. 2; R. 43).

By the use of a typical illustration of the operation of the rates, it is possible to demonstrate the significance of the actions taken and its vital importance in the economic

existence of the Appellees. A typical illustration on which there is no dispute is the rate from Texas Panhandle points to Akron, Ohio. The pre-1954 rate for the Appellee motor carriers was $1.53 cwt.; the rail rate was approximately $1.56 cwt. This slight difference came about because of the operation of the blanket general increases (R. 2; R. 43).

Early in 1954, the rail carriers published certain schedules which established a substantial differential below the motor carrier rates. In the typical illustration given above, the rate which was $1.53 became $1.4785 cwt. This gave the rails a differential below the motor carriers of 5.15¢. These schedules became effective (R. 43). Thereafter the motor carriers, including the Appellees, filed schedules designed to meet the reduced scale and to restore the parity that had theretofore existed (R. 3; R. 44). Upon the filing of these new schedules the rail carriers petitioned the Interstate Commerce Commission to suspend them, and this was done. Thereupon, the Commission entered upon an investigation of the lawfulness of the motor carrier rates, the hearing being held in July, 1954 (R. 44).

At the time of the hearing in the Court below, there had been no decision on this suspension proceeding by the Interstate Commerce Commission (R. 44). However, under date of December 14, 1955, Division 2, of the Commission, decided the proceeding which is styled *Carbon Black From the Southwest to Central and Mid-West, 66 M. C. C. 163.* The administrative processes being what they are, the parties were not advised of this decision until some time

later. With exceptions of no particular importance to the Appellees, the Commission found that the reduced motor carrier rates were just and reasonable.

The motor carriers in the suspension proceeding concerning their rates, had voluntarily extended the suspension following the seven months statutory suspension period. This was in accordance with what all parties in this cause represented to the Court below was the standard practice—to agree to the continuation of a suspension once issued (R. 44—footnote 3). As a result the Appellees' rates were frozen at their pre-1954 level of $1.53, the rails then enjoying a 5.15¢ advantage.

Notwithstanding this advantage, the rail carriers filed tariffs to become effective September 24, 1955, to establish a new schedule of rates substantially below their earlier reduced scale. For the typical movement, from Texas Panhandle to Akron, the proposed rate was $1.33 compared to the rails' 1954 rate of $1.4785 and the motor carriers' frozen rate of $1.53 (R. 45).

Under this factual situation, the Appellees and other motor carriers filed petitions requesting the Commission to suspend the proposed schedules because they were unlawful, would result in rates and charges which would be unjust and unreasonable and constitute unfair and destructive competitive practices contrary to the National Transportation Policy. Replies were filed by interested parties, including the rail carriers (R. 45).

In a conference hearing on September 21, 1955, the Suspension Board declined to suspend. However, on September 23, 1955, Division 2, of the Interstate Commerce Commission, acting as an Appellate Division on suspension matters, issued its orders suspending the proposed rail schedules and directing an investigation (R. 45). The entire order (except only the technical description of the tariffs involved) is reproduced as footnote 5 of the opinion of the Court below, and appears at the bottom of pages 45 and 46 of the record. As a part of its order, the Commission found the following facts:

> "* * * there is reason to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act, and constitute unfair and destructive competitive practices in contravention of The National Transportation Policy"; (R. 46).

The validity of the order above mentioned was conceded by all concerned. Its effect was to preserve the status quo, based upon the finding of probable cause above quoted, until the investigation was completed or the statutory suspension period had expired, whichever event should first occur (assuming that the rail carriers would not voluntarily extend the suspension period).

There the matter rested until November 14, 1955. On that date, Division 2 of the Commission issued another order (R. 7). This order is also reproduced as footnote 6 to the opinion of the Court below (R. 46).

In this order, the Commission undertook to change the status quo pending the investigation by permitting the proposed schedule to become effective on November 24, 1955. Although petitions for reconsideration had been filed (R. 46), no further hearing had been had prior to the entry of the order dated November 14, 1955 (R. 7).

This order does not undertake to say that the Commission was mistaken when it issued the admittedly valid order of September 23. It literally left in force the findings of unlawfulness, destructive competition and contravention of the National Transportation Policy (R. 57). These were the very facts which caused the Commission in the exercise of its sound discretion to feel compelled to preserve the status quo.

The Court below concluded that the action thus taken was not shown to be based on reason, and hence was arbitrary, capricious and void (R. 57; R. 59).

The Court below reasoned that since the order of November 14 was illegal, it was entirely destitute of legal effect. The admittedly valid order of September 23, 1955, was, therefore, not vacated, but remained in full force (R. 58). It necessarily followed, in the opinion of the Court below, that the reduced schedules were still under suspension. This being true, their use during the suspension period was unlawful by the express terms of the order of September 23, and the provision of Section 15(7) Part I, Interstate Commerce Act (R. 58). Reasoning that the Court had power to enjoin the use of a rate not lawfully published

and on file with the Interstate Commerce Commission as required by Section 6(3) Part I, Interstate Commerce Act, the Court below issued the injunction until such time as the order of September 23, 1955, shall have been rescinded or modified by lawful action of the Commission (R. 59).

Subsequent Proceedings

Although it could have done otherwise (R. 59) the Commission made no further effort to set aside the order of September 23, suspending the reduced schedules. Instead it proceeded with the investigation as previously ordered.

Final decision of the Commission was delivered June 25, 1956. It is reported in a proceeding styled *Carbon Black from the Southwest to the United States and Canada, 298 I. C. C. 721.*

The seven months' suspension period required by the order of September 23, 1955, expired April 23, 1956. The reduced rates were republished to become effective April 24, 1956. They have been in effect since *(298 I.C.C.722)*.

The Commission handled this proceeding much more expeditiously than it did the motor carrier rates which had been theretofore suspended *(66 M. C. C. 163)*. In the investigation of the lawfulness of the motor carrier rates, the Commission permitted the examiner to issue a proposed report, issuing its decision seventeen months after the hearing. In the instant case, the Commission determined that due and timely execution of its functions required the omission of a proposed report. The decision was rendered

on June 25, 1956, less than five months after the date of the hearing. The order discontinued the proceedings. Nothing is now pending.

SUMMARY OF THE ARGUMENT

I.

This case no longer presents a justiciable controversy. These appeals were taken by the Government and the Railroads on the assertion that the Interstate Commerce Commission had the right, by an order dated November 14, 1955, to set aside a prior order, dated September 23, 1955, wherein the Commission ordered that certain rates which the Railroads filed not become effective for a seven-month period. However, the order of September 23 has long since ceased to exist. It expired by its own terms on April 23, 1956, and the rates which the Railroads wanted to publish have been in effect since that time. In addition, the investigation ordered by the Commission has long since been completed and a final order entered. Even the petition for reconsideration has been denied.

Neither order of the Commission in this case was, in any way a "continuing order," nor a "short term order capable of repetition," as those terms were used in *Southern Pacific Terminal Company v. Interstate Commerce Commission, 219 U. S. 498*, the presence of such factors causing this Court in that case to determine that the cause was not moot, though the time limit placed in the order had expired. Neither was there sought in this case any other objective,

such as existed in *United States v. Trans-Missouri Freight Association, 166 U. S. 290.* Finally, the orders here had no effect beyond their expiration date, unlike the rate order mentioned in *Boise City Irrigation and Land Co. v. Clark, 131 Fed. 415*, cited by this Court with approval in *Southern Pacific Terminal*, supra.

Decisions of this Court are uniform in holding that the Court is not empowered to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. *United States v. Hamburg-Amerikanische, etc., 239 U. S. 466; United States v. Alaska Steamship Co., 253 U. S. 113; Amalgamated Association v. Wisconsin Employment Relations Board, 340 U. S. 416.* This case is controlled by the cases just cited.

II.

A. The Commission's order, attacked by Appellees, was sufficiently final in substance to subject it to judicial review. In determining whether an order of an administrative agency possesses the requisites of finality so as to permit judicial review, resort is had, primarily, to the well-pleaded averments of the Complaint. *Utah Fuel Co. v. National Bituminous Coal Commission, 306 U. S. 56.* "The ultimate test of reviewability is not to be found in an over-refined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal conse-

quences to action taken in advance of other hearings, and adjudications that may follow, the results of which the regulations purport to control." *Columbia Broadcasting System v. United States, 316 U. S. at 425.* Here, the Commission had entered an admittedly valid suspension order, based on express fact findings that reduced rates proposed by competitors of Appellees would result in destructive competitive practices, in contravention of the National Transportation Policy, if they were permitted to become effective during the investigation period. Suddenly, without hearing, without warning and without reason, the Commission decided to withdraw the order and let these rates go into immediate effect, though the investigation ordered had not even begun. This threatened to the Appellees immediate, severe and irreparable injury. The impact of this order upon them was, at that moment, as conclusive, definite and substantial as it would ever be. The order was, therefore, sufficiently final, in substance, as to permit judicial review. *Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. at 154* (footnote 4).

B. Even a discretionary order, provided it possess the requisites of finality, is subject to judicial review where the Complainant asserts that there was an abuse of discretion. The true rule is that where a statute confides discretion to an administrative agency, there is implied in the very grant of the power the requirement that in the exercise of the power the agency will not abuse the power thus granted. The very extent of the power conferred raises a corresponding duty that the discretion shall be exercised,

not capriciously or fraudulently, but reasonably. This Court has never hesitated to set aside discretionary orders where the exertion of the authority has been manifested in such an unreasonable manner as to cause it to be within the rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Interstate Commerce Commission v. Illinois Cent. R. Co., 215 U. S. 452, 470.*

The principles established by the decisions of this Court, holding that arbitrary action may always be reviewed, except in the rare event that the applicable statute expressly prohibits judicial scrutiny, were well-settled legal principles long before the passage of the Administrative Procedure Act. Consequently, Appellants are in error in their stated belief that the District Court evidently considered that Section 10 of the Administrative Procedure Act conferred jurisdiction upon it where none had theretofore existed. A reading of the District Court's opinion reveals clearly that sole reliance was not placed upon the Administrative Procedure Act. The long-established principles were first cited, after which the Court observed that such requirements had now been made explicit by the Act.

Although no such contention is expressly advanced, the Government Appellants argue, in effect, that Section 10, of the Administrative Procedure Act, operates to take from the Courts any authority they may have theretofore possessed to review discretionary actions of administrative agencies. This line of reasoning is based upon the theory

that since the provisions of Section 10 are prefaced by the words: "Except so far as * * * (2) agency action is by law committed to agency discretion," no power of review exists. Such an interpretation is erroneous because it makes meaningless the provisions of subsection (e) of Section 10 which requires the Courts to set aside any agency action found to constitute an abuse of discretion. It also ignores the fact that this Court has heretofore defined "Discretion" as including a discretion based on reason. This also is the plain intent of Congress as the legislative history of the Act makes abundantly clear.

III.

On the merits, the District Court was careful to point out that it was not substituting its judgment for that of the Commission; neither was it concerned with reviewability, or its extent, of Commission action in suspension matters generally. Although the Appellants argue that the sole reason for setting aside the Commission's order was its failure to make "detailed fact findings," the action of the Court below was not so restricted. The real vice in the Commission's order was that the Commission made and reaffirmed findings which required it to do one thing. Then, in contravention of its own findings, it did the opposite.

A suspension order is, for all practical purposes, a temporary injunction. Although the rule is well established that the grant or denial of a temporary injunction rests

within the sound discretion of the trial court which action will not be set aside except for an improvident use of that discretion, the appellate courts have not hesitated to set aside trial court orders where there has been abuse of discretion. This extends to orders refusing injunctions as well as those granting them. Where a case for a temporary injunction is clearly made out, it is not open to the trial courts to deny the remedy. *Western Electric Company v. Cinema Supplies, 80 Fed. 2d 106 (cert. den. 297 U. S. 717.* The same rule applies to Commission actions.

Although the statute does not require the Commission to make fact findings when it denies a suspension request, it does not at all follow that the same rule should obtain when the Commission vacates a suspension order theretofore validly issued. The reason is that the circumstances are entirely different. No action at all is required of the Commission if it should decline to suspend. Under the Interstate Commerce Act, the carrier has the right to initiate its own rates. This is done simply by publication and filing with the Commission 30 days before the effective date. Unless the Commission takes affirmative action, by a suspension order, to stop it, the rates become effective automatically. When the Commission thus interferes with the carrier's right to establish its own rates, it must have sound reasons therefor, and must, moreover, give them to the carrier in writing. The only sound reason the Commission can have for such interference with the rights of the carrier is that the rights of others would probably be

jeopardized thereby and that such rights need to be protected by the maintenance of the status quo.

Once the rights of other persons are recognized by the Commission, the Commission is under a mandatory duty to protect them. When, as here, it issues a suspension order to preserve the status quo, the persons whose rights are being thus protected acquire a vested right in the order. This right thus acquired, the Commission may not arbitrarily remove. If perchance, the Commission should later decide it was wrong about the facts, it owes such other persons the same duty, in simple fairness, to state its reasons as it owed the carrier to state why it was interfering with the carrier's rights in the first instance.

An unbroken line of decisions, both before and after the passage of the Administrative Procedure Act, declare that when action of a definitive character, such as the one here under consideration, is taken by an agency, there must be stated in the very order itself, a statement of the basic or essential findings or reasons prompting such action. Otherwise, the action is held to be arbitrary. *State of Florida v. United States, 282 U. S. 194.* The holding of the District Court here but followed those well-established legal principles.

The argument here advanced to the effect that Section 8 of the Administrative Act does not apply to the Commission in this case is the same argument that the Commission advanced in *Riss v. United States, 96 F. Supp. 452.* That

argument, and the decision which upheld it, was reversed by this Court *(Riss v. United States, 341 U. S. 907, per curiam)*.

IV.

Since the District Court correctly determined that the order of November 14 was void, the consequences thereof naturally and inevitably followed. There is not here present a situation where the Court set aside rates "lawfully in effect," as the Appellants charge. The reduced rate schedule published to become effective November 24 was never lawfully in effect. The lawful effectiveness of these rates depended upon the validity of the order of November 14. Since it was invalid, the rate schedule filed pursuant thereto was likewise invalid.

This is so because the void order could not have had the effect of setting aside the order of September 23. This suspension order was, therefore, in full force. It prohibited the use of the reduced schedule until April 23, 1956. Therefore, the rates published were in contravention of that order and were themselves invalid.

Even if it could be said that rates published in direct contravention of a valid suspension order are, nevertheless, valid rates, the rates published between November 14 and November 24, to become effective on the latter date could not qualify. Such rates would be invalid because in conflict with the requirements of Section 6 (3) of the Interstate Commerce Act. This section requires that when a

carrier establishes a new rate the tariff naming it must be published and on file at least 30 days before the date on which it is scheduled to become effective. These rates did not meet that requirement.

Since the order of November 14 was void, the only judgment the Court could render was one declaring that the situation must be considered and treated, in all respects, as though the void order had never been entered. Any confusion that existed therefore, was but the inevitable confusion that always exists when one relies on the validity of an act that later proves to have been, all the while, invalid. Moreover, the carbon black shippers, including a representative of the Association which ships 95% of all carbon black used in the United States, were present at the trial. They had actual knowledge of the attack upon the rates.

ARGUMENT

I

There is now present no justiciable controversy.

The order of the Commission, dated September 23, 1955, suspended the reduced rate schedule filed by the Railroad Appellants until April 23, 1956. (R. 6.) Under Section 15 (7) Part I Interstate Commerce Act, this was not an order capable of repetition. It was not a continuing order.

This appeal presents only one fundamental question: Whether the Commission had a right, under the circumstances, to set aside this order by its subsequent order of November 14, 1955.

However, the order which the Appellants now ask the Court to declare the Commission had the right to set aside, has been set aside. It expired by its own terms on April 23, 1956. The rates were republished and became effective the next day *(298 I. C. C. 722)*. Furthermore, the entire subject matter was disposed of by the Commission on June 25, 1956.

It is, therefore, respectfully submitted that this cause is controlled by the decisions of this Court in such cases as *California v. San Pablo T. & R. Co., 149 U. S. 308, 314; United States v. Hamburg-Amerikanische, etc., 239 U. S. 466; United States v. Alaska Steamship Co., et al., 253 U. S. 113; St. Pierre v. United States, 319 U. S. 41; Amalgamated Association v. Wisconsin Employment Relations Board, 340 U. S. 416;* and *Doremus v. Board of Education, 342 U. S. 429.*

Such cases as *Southern Pacific Terminal Company v. Interstate Commerce Commission, 219 U. S. 498,* and the two cases cited in that opinion *(United States v. Trans-Missouri Freight Association, 166 U. S. 290; Boise City Irrigation and Land Co. v. Clark, 131 Fed. 415)* are distinguishable in principle and are not controlling.

In the *Southern Pacific Terminal* case, supra, the Interstate Commerce Commission had required the Southern Pacific System to cease discriminating in favor of one Young. Although the first order was limited to a period of two years the Court observed that it was manifest that it was a continuing order and to some extent might be the

basis of further proceedings. It was also observed that the short term order was capable of repetition *(219 U. S. 515)*.

In the *Trans-Missouri Association* case, supra, the object of the suit was to enjoin the defendants from continuing a course of conduct alleged to be in violation of the anti-trust laws. The association was voluntarily dissolved but the Court held that the dissolution was not the important object of the litigation; that the litigation also sought to enjoin the defendants for the future.

In the *Boise City* case, supra, the Court of Appeals for the Ninth Circuit assumed jurisdiction over a rate controversy, though the ordinance establishing the rate had expired, on the ground that under the statute a rate fixed by city ordinance continued in effect until changed.

In the instant case there is no element of a continuing controversy between the parties Appellants and Appellees. Indeed, the statement of Circuit Judge Lacombe, in *United States v. Prince Line, 220 Fed. 230, 234*, that: "the logic of events has turned this investigation into an autopsy, instead of a determination of live issues," is particularly an appropriate one.

In *United States v. Hamburg-Amerikanische Co., et al., 239 U. S. 466, 475*, it was urged upon this Court that the matters at issue, although without present actuality because of the legal consequence springing from the European War ~~the Court~~ should nevertheless be decided because of the character of the questions and the possibility or probability that, on the cessation of war, the parties would resume or recreate their asserted illegal combination.

This Court rejected the theory and in so doing reiterated the elementary principle which this Court had theretofore stated in *California v. San Pablo & T. R. Co., 149 U. S. 308, 314*, and which because of its evident applicability to the situation here present we quote *(239 U. S. 475-6)*:

> "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard."

It is also worthy of note that in *United States v. Hamburg-Amerikanische Co., 239 U. S. 476-477*, this court distinguished the *Southern Pacific Terminal* case and the *Trans-Missouri Freight Association* case. That distinction, Appellees submit, is equally applicable here.

It is hinted by the government Appellants that there is a continuing controversy because of the presumed obligation the rail carriers may have to collect undercharges (Page 41, footnote 19, brief of United States and I. C. C.). It is plain however that in order for there to exist a justiciable controversy the controversy must, to say the least, be one between the parties to the litigation. As was

stated by this court in *Aetna Life Insurance Co. v. Haworth, 300 U. S. 239-241*, the controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character. All these elements are now lacking.

The writer of this brief would much rather see the judgment of the court below upheld on its merits. Subsequent portions of this brief will reveal that the judgment is entitled to be affirmed if the controversy is now justiciable.

Believing it counsel's duty however, to resist efforts to secure advisory opinions from the courts in the absence of justiciable controversies, regardless of the advocate's own personal feeling in the matter, it is respectfully submitted that under this record the cause is moot.

II

The Court Below Correctly held That the Commission's Order of November 14, 1955 was reviewable because:

A. It possessed the requisites of finality.

B. A descretionary order possessing the requisites of finality is subject to judicial review for abuse of discretion.

Preliminary Statement

The Appellants assert that the District Court was wrong in taking jurisdiction of this case because, it is said, the order under attack was but an interim, or procedural

order, and therefore lacked the necessary finality for judicial review. It is further contended that even assuming the requisite finality, the subject matter in question was so exclusively entrusted to the discretion of the Commission as to place it beyond the pale of judicial scrutiny, even for abuse of discretion.

Since the Appellants are asking this Court to declare that the District Court was wrong, it is but fair that the action of the District Court be examined in the light of the facts as they existed when the District Court acted. Jurisdiction of a cause is assumed at the beginning of litigation, not at the end. The determination of jurisdiction is based upon the well-pleaded averments in the complaint. Should it happen that the proof fails to support the allegations, judgment goes against the complainant, but the proper decree is that the complainant take nothing, not one of dismissal for want of jurisdiction. *Utah Fuel Co. v. National Bituminous Coal Commission, 306 U. S. 56.*

A. The Order of November 14, 1955, Possessed the Requisites of Finality.

The fact that an administrative agency order may be labeled "Interim," or "Procedural," or "Discretionary," does not, standing alone, insulate it from judicial review. This has been well settled by cases of this Court.

"Government action is final in the sense here involved when at no future time will its impact on the petitioner become more conclusive, definite, or substantial." *Joint*

Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 154 (footnote 4, concurring opinion, Mr. Justice Frankfurter).

"If the ultimate impact of the challenged action on the Petitioner is sufficiently probable and not too distant, and if the procedure by which that ultimate action may be questioned is too onerous or hazardous, 'standing' is given to challenge the action at a preliminary stage" (citing authorities). *Joint Anti-Fascist Refugee Committee v. McGrath*, supra, at 156 (concurring opinion Mr. Justice Frankfurter).

In holding that certain regulations promulgated by the Federal Communications Commission were orders possessed of requisite finality, though they were interim in the sense that they were not directed to the appellant and required further administrative action to put them into effect, this Court, in *Columbia Broadcasting System v. United States, 316 U. S. 407 (at 424-425)*, declared:

> "We need not stop to discuss here the great variety of administrative rulings which, unlike this one, are not reviewable * * *. But we should not for that reason fail to discriminate between them and this case in which, because of its peculiar circumstances, all the elements prerequisite to judicial review are present. The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings, and adjudications that may follow, the results of which the regulations purport to control."

In *Utah Fuel Company v. National Bituminous Coal Commission, 306 U. S. 56*, the Commission had required of the complainants certain information as to their costs. When required, this information was labeled by the Commission as confidential and the complainants furnished it without objection. Subsequently, the Commission issued an interim procedural order stating that it proposed to enter upon a hearing as to prices and that the confidential information theretofore received would be disclosed. Complainants sought an injunction against the threatened disclosure alleging immediate and irreparable injury and lack of adequate relief otherwise. The proposed action was challenged as being arbitrary and in violation of law.

The Court of Appeals for the District of Columbia *(Utah Fuel Co. v. National Bituminous Coal Commission, 101 Fed. 2d 426)*, held that the order complained of was preliminary and procedural in character, lacking in administrative finality and not subject to judicial review.

This Court, however, did not agree and so stated in as many words.

In holding that the action of the Commission in that case was reviewable, this Court says *(306 U. S. 60)*:

> "Considering the circumstances here alleged, the great and obvious damage which might be suffered, the importance of the rights asserted, and the lack of any other remedy, we think complainants could properly ask relief in equity. The jurisdiction of a District Court is to be 'determined by the allegations of the bill, and usually if the bill or declaration makes a claim

> that if well founded is within the jurisdiction of the Court, it is within that jurisdiction whether well founded or not' " (citing authorities).

Of course, in the *Utah Fuel Company* case, supra, the District Court had found that the agency action complained of was not arbitrary or in violation of law. This Court affirmed that finding. The point here is, however, that the action of the agency was expressly declared to be reviewable, and the action of the Court of Appeals in declaring it not reviewable was expressly overruled.

It is submitted that the facts which existed at the time this suit was filed in the District Court show every element essential on the part of Appellees to have the order of the Commission judicially reviewed. The Commission had made an order suspending the reduced rates on the ground that they were probably unlawful (R. 5, 6). The Appellees alleged immediate and irreparable injury would result to them by the promulgation of the order under attack (R. 9). It was shown that Appellees were then receiving revenues in excess of $1,000.00 per day for transporting that traffic; that they would lose the whole of this revenue during the period that the lawfulness of the rates was being investigated, and that this revenue could never be recovered (R. 9-10).

Moreover, the Court below found as a fact the existence of immediate and irreparable loss and injury (R. 47-48, footnote 9). The only other remedy available to the Appellees at all was to await the outcome of the Commission's

investigation or to institute a complaint against the rail rates. Neither course would have been efficacious. If the Commission's order was an arbitrary one (and the lower Court held it was) the loss of the revenue accruing during the investigation period was both substantial and irrecoverable. Nothing is suggested, and nothing can be suggested, by Appellants as to how the Appellees could have protected themselves against such loss.

Therefore, this order, as shown in the complaint, was one which if permitted to become effective at all, would visit upon the Appellees immediate, severe and irremediable consequences. Its effect then would be as conclusive, definite and substantial as would ever have been the case. There was no other administrative machinery to apply to for relief. The allegation that the action was arbitrary, coupled with the facts that if the action were indeed wrong, the consequences would be severe, brings this case squarely within the rule announced by this Court in the cases heretofore cited.

The principle for which we contend has received uniform application by the Federal Courts in a number of cases where the factual situation was very much like the one here. *Isbrandtsen Co. v. United States, 211 Fed. 2d 51 (cert den. 347 U. S. 990); Phillips Petroleum Company v. Federal Power Commission, 227 Fed. 2d 470 (at 472-73) (cert. denied 350 U. S. 1005); Cantlay & Tanzola v. United States, 115 F. Supp. 72; Pacific Inland Tariff Bureau v. United States, 129 F. Supp. 472, 134 F. Supp. 210.*

B. *A discretionary order, possessing the requisites of finality, is subjecvt to judicial review for abuse of discretion.*

Both sets of Appellants argue that since the Commission is given discretion in the matter of whether or not to issue a suspension order, the Commission's actions in connection with a suspension proceeding are not subject to judicial review, even though the order might have the requisites of finality.

They cite a number of cases where the Federal Courts have declined, on jurisdictional grounds, to substitute their judgment for that of the Commission with respect to whether in a given case, a suspension order should, or should not, issue.

From these cases, they seek to draw the conclusion that under no circumstances could a court review any action of the Commission issued in connection with a suspension matter.

While the Appellants carefully avoid making the direct admission, the inevitable effect of their contention is to say that any order entered by the Commission in a suspension proceeding is not reviewable by the Federal Courts even though entered arbitrarily, and in defiance of law.

Such a sweeping contention for administrative finality is out of harmony with the general legislative pattern of administrative and judicial relationships. See *United States v. Interstate Commerce Commission, 337 U. S. 426, 433-4.*

Under the theory advanced by the Appellants, an order of the Commission suspending a rate schedule would not be reviewable, even though the Commission refused to "deliver to the carriers affected thereby a statement in writing of its reasons for such suspension," in absolute defiance of the express provisions of Section 15(7), Interstate Commerce Act, from which the quoted phrase was taken.

Indeed, the only case quoted from by Government Appellants on this phase of the argument was *Humble Oil & Refining Company v. Federal Power Commission, 236 Fed. 2d 819.* On page 823 of that decision, the majority said:

> "The conclusion that we have reached that this Court has no jurisdiction to review the suspension order at this time, renders it both inappropriate and unnecessary to pass upon the contentions * * * that the Commission failed to state 'reasons' for such suspension * * *."

It is, perhaps, significant that the Railroad Appellants failed to cite the *Humble Oil Co.* case, supra. It may be safely assumed that they would not agree that the Commission could suspend their rates without complying with the statute.

It is rather startling that the majority of a federal court of appeals would leave in its opinion wording which the Commission apparently will now use as authority for the proposition that so long as the statute commits the

action to agency discretion, the agency need not comply, even with the statutory conditions annexed to the commitment.

However, the quoted expression from the Court of Appeals was not what the Court actually decided in that case. The Commission did, in fact, state reasons. The decision went no further than to hold that the suspension order had only one objective: to preserve the status quo pending investigation. On the other hand, both the Fourth Circuit (in *Atlantic Seaboard Corp. v. Federal Power Commission, 201 Fed. 2d 568)* and the Tenth Circuit (in *Phillips Petroleum Company v. Federal Power Commission, 227 Fed. 2d 470)* have construed the same statute as authorizing judicial review on the grounds of an abuse of discretion. Significantly, both the Fourth Circuit and the Tenth Circuit cases were by a unanimous court, while the *Humble* case was by a divided court. Too, certiorari was denied in the *Phillips* case *(350 U. S. 1005)*.

The true rule is, of course, that where a statute places action in administrative agency discretion, there is implicit in the very grant of statutory power the requirement that the agency will, in the exercise of that power, use discretion—not abuse it.

Thus, in *Ripley v. United States, 223 U. S. 695*, in answer to a contention that the Court could not go behind

the decision of a land agent as to when a construction project could proceed, this Court said (at pp. 701-2):

> "But the very extent of the power and the conclusive character of his decision raised a corresponding duty that the agent's judgment should be exercised not capriciously or fraudulently, but reasonably, and with due regard to the rights of both the contracting parties."

This opinion was delivered March 11, 1912, many years before the Administrative Procedure Act was conceived.

In *Interstate Commerce Commission v. Illinois Central R. Co., 215 U. S. 452 (at 470)*, this Court held:

> "*Beyond controversy*, in determining whether an order of the (Interstate Commerce) Commission shall be suspended or set aside, we must consider (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because *the exertion of authority which is questioned has been manifested in such an unreasonable manner*, as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power." (Emphasis supplied.)

In *United States v. Interstate Commerce Commission, 337 U. S. 426 (at 431)*, this Court declared:

> "But the Government charged that the order was entered arbitrarily and without substantial evidence. This charge alone would be enough to present a justiciable controversy."

In *Arenas v. United States, 322 U. S. 419 (at 432)*, this Court said:

> "Even in some discretionary matters it has been held that if an official acts solely on grounds which misapprehended the legal rights of the parties, an otherwise unreviewable discretion may become subject to correction."

Neither set of Appellants has cited any decision where a federal court has held that an order, possessing the requisites of finality as established by this Court in *Columbia Broadcasting System v. United States, 316 U. S. 407*, is not subject to judicial review on the ground of the abuse of discretion. With the sole exception of *Lynch v. United States, 292 U. S. 571*, we have found none. On the other hand, decisions, both state and federal, to the effect that administrative determinations will be interfered with by the Courts where the determination is an exercise of power so arbitrary or unreasonable as virtually to transcend the authority conferred, or is otherwise an abuse of discretion, are legion. Even to cite them would unduly prolong this brief.

Lynch v. United States, supra, is actually authority for the principle applied by the District Court in this case. That was a case of a congressional bounty,—a pension to a war veteran. Section 17 of the Economy Act *(38 U. S. C. 705)* provided that all decisions relating to these gratuities, made by the Administrator of Veterans' Affairs should be final and conclusive, both as to law and fact, and no court should have jurisdiction to review. This Court held in that

case that the evident purpose of the section was to preclude the possibility of judicial relief even where the decision was arbitrary. Thus, it appears that when Congress determines that no judicial review is to be provided, express language is necessary.

In their respective briefs the Appellants (p. 28, Government Brief; p. 10, Rail Brief) in almost identical language argue that the District Court adopted the view that its right to review this discretionary order on the ground of an abuse of discretion was founded solely in Section 10 of the Administrative Procedure Act.

The Rail Appellants then proceed to answer their own conception of what the District Court held by the assertion that the Administrative Procedure Act did not enlarge the scope of judicial review. The Government Appellants argue that since Section 10 is prefaced by the words: "Except so far as * * *(2) agency action is by law committed to agency discretion," the courts have no power, under Section 10 to review any action of an administrative agency where discretion is alleged to be involved.

There are two answers to Appellants' contention: First, The power and duty of the Courts to review administrative discretionary actions was declared and enforced long before the advent of the Administrative Procedure Act. For their argument to be valid they would have to contend that Section 10 took away from the Courts the jurisdiction which they had theretofore exercised. Second: This contention ignores subsection (e) of Section 10 which expressly

directs the reviewing court to: "(B) hold unlawful and set aside agency actions, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law";

Obviously, agency discretion must exist before agency discretion can be abused. If the law be that agency action committed to agency discretion is totally exempt from judicial scrutiny, then the positive direction that the courts shall set aside agency action found to be an abuse of discretion is rendered meaningless. Such a contention violates the fundamental rule of statutory construction, that all parts of a statute must be read and construed together. So construed, it is plain that the words "agency discretion" as used in the preface to Section 10 mean a judicial discretion; a discretion based on sound reasoning. That such was the intent of Congress is made abundantly clear by reference to the legislative history, appearing at pages 53-56 of the Record, as footnote 13 to the opinion of the District Court, and particularly to the comments of Senators Donnell and McCarren (R. 56).

It is clear from the opinion of the District Court that sole reliance was not placed upon the Administrative Procedure Act (R. 52). After citing this Court and other federal courts to demonstrate the invalidity of the order under general law, the Court also added: "Moreover, this requirement has now been made explicit by the administrative Procedure Act" (R. 52).

It was heretofore established that the order in question possessed the requisites of finality so as to permit judicial review. Once that is established, the order must be examined and tested, under all the authorities, as any other agency order sufficiently final in substance to be brought under judicial scrutiny. The cases reject the idea that there is any such thing as a final order of a discretionary character which is exempt from review where challenged on the ground that the action is arbitrary, capricious, an abuse of discretion or otherwise unlawful.

III

The District Court correctly held that the Commission's Order of November 14, 1955, was void because it was arbitrary, capricious, not based on reason and constituted an abuse of discretion.

In previous portions of this argument we have demonstrated that the challenged order of the Commission was possessed of the requisites of finality essential to judicial review, and not a mere procedural order. Also, that a complaint, attacking such an order upon the grounds that it was arbitrary, capricious and an abuse of discretion presents a justiciable controversy.

Under this portion, we demonstrate that the Court was correct in holding that the order was, in truth, arbitrary, capricious and an abuse of the statutory discretion confided by Congress to the Commission.

In the beginning, it is well to state what the District Court *did not* decide. The Court was careful to point out that it was not undertaking to substitute its judgment for that of the Commission, or pass judgment upon the intrinsic merits of the ultimate granting or denial of a suspension (R. 48). The Court stated that it was not concerned with the question of reviewability, or extent thereof, of Commission action, declining to suspend proposed rates, such as that involved in the cases cited by the Appellants in their briefs here (R. 49, footnote 10).

Actually, all the District Court did in this case was to declare that where, as here, the Commission has found a state of facts to exist, which compel it, in the exercise of its sound discretion, to suspend the rates, thereby preserving the status quo until an investigation can be had; it cannot, while re-affirming the very facts which required it to suspend, vacate the suspension.

The Appellants seem to argue that the sole ground for the setting aside of the Commission's Order was that the Commission made no "detailed fact findings" as a basis therefor. The decision was not so restricted. The District Court pointed out with respect to the assailed order, that:

> "It literally left in force the findings of unlawfulness, destructive competition, and then, without more than the magic phrase 'good cause appearing,' determined that what on September 23 led them to suspend, now led them to unsuspend." (R. 57.)

Therefore, the real vice in the Commission's action is that the Commission made findings which, it said, required

it to do one thing. Then, in contravention of these findings, did the opposite.

With one possible exception[1] the Appellants make no effort to demonstrate that the action of the Commission was proper, in a de facto sense, as distinguished from an argument that the actions were insulated from judicial scrutiny. This, at once, raises the suggestion that such action is, in truth, an arbitrary one.

A suspension order of the Interstate Commerce Commission entered under Section 15 (7) Part I, of the Interstate Commerce Act, is, for all practical purposes, a temporary injunction. Its purpose is the same: to preserve the status quo until such time as final determination can be made of the issues presented. No rule is better settled than the one which proclaims that the granting or denial of a temporary injunction pending final hearing is within the sound judicial discretion of the trial court, and that upon an appeal the action of the trial judge will not be reviewed or set aside unless such action was the result of an improvident use of that discretion. *American Federation of Musicians v. Stein, 213 Fed. 2d 679; Huber Baking Co. v. Stroehmann Brothers, 208 Fed. 2d 464; Home Decorators, Inc. v. Herfort, 179 Fed. 2d 398.*

[1]The exception is advanced by Government Appellants in one paragraph on pages 38-39 of their Brief. There the thought is presented that the words "good cause appearing" mean that the Commission was convinced after further study that the facts theretofore stated did not exist and that it no longer had any reason to believe that the rates proposed were unlawful. If that were true, as the District Court said, the Commission could have so stated (R. 56). The further question is also presented: Why, in such a case, continue the investigation at all? A sufficient answer to the footnote quotation from Judge Parker's decision, is that when courts *change their minds* as the Commision did here, they state the reasons for so doing.

Appellate courts have, however, not hesitated to set aside the action of trial courts in interlocutory injunction matters where there has been an abuse of discretion. In *Western Electric Company v. Cinema Supplies (C. A. 8th), 80 Fed. 2d 106 (cert. den., 297 U. S. 717)*, the findings of fact made by the trial judge in the application for temporary injunction were in accordance with the contentions of the plaintiffs. Nevertheless, the trial judge declined to issue the injunction on the ground that it had balanced all the equities and decided not to issue the order. The Appellate Court reversed and directed a temporary injunction to issue. In so doing the court commented: (at 110)

> "We think these finding and conclusions of the trial court * * * clearly establish the right of the plaintiff companies to the injunctive order for which they had applied. It appears to us that all of the elements upon which their right to such injunctive order must depend, were present, proven by the weight of evidence, and found by the trial court * * * although it is true, as reiterated in many cases, that the issuance or withholding of temporary injunction rests in the discretion of the trial court, the discretion meant is a sound judicial discretion, exercised in conformity with equity rules and precedents (citing authorities). Where a case for temporary injunction is clearly made out, it is not open to the trial court to deny the remedy." (Citing authorities.)

So, as here, where the Commission has found facts which clearly made out a case for suspension, it is not open to the Commission simply to find the requisite facts on the one hand, and to deny the relief on the other.

The Appellants present the argument that since the statute does not require the Commission to make findings when it denies, initially, a request for suspension, an order setting aside a valid suspension requires no finding. The conclusion does not logically follow from the premise.

Under the Interstate Commerce Act, the carrier has the right to initiate its own rates. Even under the discretionary power confided to the Commission by virtue of Section 15 (7), the Commission may not suspend rates thus initiated out of sheer whim or caprice. It must have a reason for so doing. Furthermore, under express mandate of the statute, it must state its reasons in writing and furnish them to the carrier whose rights to initiate rates are thus being interfered with by the Commission. Actually, the only reason that the Commission could, in the exercise of sound discretion, enter a valid suspension order is because the Commission's judgment tells it that the rates are probably unlawful. But freight rates could not be unlawful unless they interfere with the rights of others who are entitled to protection.

All this is but to say that the only reason the Commission can issue a valid suspension order is because it has determined that the rights of other persons are probably in jeopardy, and that the rights of such other persons need to be protected by the maintenance of the status quo during the investigation period.

So, when the Commission has found, upon the complaint of interested parties, that their rights are probably ad-

versely affected; that such rights need to be protected by the maintenance of the status quo, and proceeds to so protect them by the issuance of the suspension order; then, and in the event the Commission should later determine that it was in error, the facts which caused it to decide not to protect the rights of others should be stated to the same extent as the statute requires that the reasons for interfering with the rights of the carrier in the first place must be stated.

To the argument, if made, that the statute makes no such express requirement, a sufficient reply is: The statute does not expressly permit the Commission to vacate a suspension once entered. Yet, it would be a poor rule of justice which would deny to the Commission the right to correct an error made through misapprehension of the facts. On the other hand, if in the administration of justice, the Commission is to be permitted to change its order on the basis of the development of new facts, then the elementary principles of fair play require that those persons whose rights are now to be adversely affected be furnished with a like statement of the reasons for such change of heart.

Certainly there is no statutory requirement that in denying a suspension order the Commission must assign reasons therefor. This is, however, because no action is required by the Commission. A carrier subject to the act simply files the proposed rate changes, at least thirty days

in advance of the date in which they are to go into effect. Unless the Commission takes affirmative action to suspend these schedules, they go into effect automatically. In the exercise of its sound discretion the Commission does not take any action towards suspension unless it appears that somebody will be injured by the proposed schedules. Once the rights of these other persons are recognized by the Commission, the Commission is under a duty to protect those rights. When it issues an order to preserve the status quo during the investigation process, those persons whose rights are being thus protected acquire a vested right in the administrative process itself. These rights the Commission may not arbitrarily remove.

Action of a definitive character such as the one here under consideration, is arbitrary, under an unbroken line of decisions, unless there exists in the very order itself a statement of basic or essential findings. These are required to support the Commission's order. In applying this rule, the District Court did no more than follow prior decisions of this Court such as *State of Florida v. United States, 282 U. S. 194, 215,* and other cases cited by it in its opinion (R. 52).

The decisions establishing those fundamental principles were handed down long prior to the passage of the Administrative Procedure Act. It is therefore incorrect to assume, as the Appellants do, that the District Court's decision in this case was based solely and entirely upon Sections 8 and

10 of that Act. The action of the Court was in accordance with established legal principles. Those legal principles were applicable to the case at bar.

To the familiar argument of administrative agencies that the provisions of the Administrative Procedure Act should not or do not apply to them, nothing need be added to what was said by this Court in *Wong Yang Sung v. McGrath, 339 U. S. 33 (36-45).*

It is of interest to notice, however, that the argument here advanced by the Government Appellants (that Section 8 is inapplicable because hearings are not required) was the precise argument advanced by the Commission in *Riss & Co., Inc. v. United States, 96 F. Supp. 452.* The District Court thought the contentions there made by this Appellant were sound. It therefore held that Section 8 did not apply to the Commission in the Convenience and Necessity proceedings there under consideration.

On appeal, however, this judgment was reversed in a per curiam opinion consisting (aside from citation of authority) of only four words. *Riss & Company v. United States, 341 U. S. 907.*

By every judicial test prescribed by this Court, this order of the Commission dated November 14, 1955, was arbitrary, capricious, unwarranted, and an abuse of the discretion confided to the Commission by the statutes. Therefore, the District Court was correct in ordering it set aside and declaring it entirely destitute of legal effect.

IV

The District Court correctly enjoined the use of the rate schedules published for use between November 24, 1955, and April 23, 1956, because they were issued in contravention of a valid suspension order of the Commission which was still in effect.

The final point made by both sets of Appellants is in substance as follows:

Conceding, arguendo, that the order of the Commission under attack was subject to judicial review and that the Court below correctly set it aside as void; still the Court lacked power to enjoin the rates which were published to become effective November 24, 1955, same being predicated upon the void order of the Commission. The theory seems to be that because the District Judge, prior to the convening of the three-judge Court, declined, at the instance of the Appellants, to issue a temporary restraining order, the three-judge Court was thereafter powerless to grant any relief.

Appellants view the situation as "startling," charging that the District Court has attempted to set aside rates lawfully in effect; that thereby it has usurped legislative functions and has undertaken to make rates.

It is respectfully submitted that in making these charges the Appellants have failed to appreciate the significance of their arguendo concession. Although they begin their argument upon the premise that the order was void, they are

unable to eradicate from their minds their contention that the order under attack was valid. Hence, their confusion.

In order to properly test the validity of this phase of their argument, a review of the factual situation is necessary.

On September 23, 1955, the Interstate Commerce Commission issued a suspension order. Admittedly, this order was valid (R. 4-6). By virtue of this order the rate schedules under consideration were suspended and not allowed to become effective. A part of the order stated that "neither the schedules hereby suspended, nor those sought to be altered thereby, shall be changed until this proceeding has been disposed of, or until the period of suspension has expired, unless otherwise ordered by the Commission" (R. 6).

At some time after November 14, 1955, and prior to November 24, 1955, the rail carriers published and filed another supplement advising that the suspended rates would become effective November 24, 1955 (R. 27). Of course, this latter action was taken pursuant to the order of November 14, 1955. However, as has already been demonstrated (and as conceded, arguendo, under this phase of the argument), this order of November 14, 1955, was void.

The order of November 14, 1955, being void, it did not have, and could not have, the effect of setting aside the admittedly valid order of September 23, 1955. It is axio-

matic, therefore, that the order of September 23, 1955, was still in full force and effect. This order not only prohibited the use of the new schedules, it prohibited any change in the schedules sought to be altered by the suspended schedules (R. 6). Consequently, the supplement filed after November 14, and prior to November 24, 1955, was issued in direct contravention of this valid suspension order. Being in contravention of such order, any use of it was unlawful, and void.

Furthermore, even if the supplement filed after November 14, to become effective November 24, is considered independently of any action of the Commission, its filing was void because it is in contravention of Section 6(3) Part I, Interstate Commerce Act.

Section 6(3) provides that no change shall be made in rates by railroads subject to the Act, "except after thirty days notice to the Commission, published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect"; there is, of course, a proviso that the Commission may, "in its discretion and for good cause shown, allow changes upon less than the notice herein specified." However, no valid action of the Commission undertook to permit changes upon less than the thirty days notice specified in the statute. Thus, even if it could be said that a rail rate schedule published in contravention of a valid order of the Commission, is nevertheless a valid rate which could not be set aside, such

argument would have no application here because any such change in rate must, for the protection of the public, be published for thirty days before it went into effect. Admittedly the change could not have more than nine days notice before the effective date.

With this factual situation confronting it, the District Court took—not startling action—not rate making functions—but the only legal action it could possibly take: Since the order of November 14, 1955, was void, it had no legal effect, and the situation must be treated precisely as though the order of November 14, 1955, had never been entered.

Thus analyzed, the situation is not complicated. The rail Appellants attempted to change a rate schedule which was under valid suspension, and which they were ordered by the Commission not to do. The suspension order had been issued by the Commission to preserve the status quo, and to protect the Appellees. The status quo being thus disturbed, it plainly became the duty of the Court to restore it until such time as the Commission, through valid proceedings, might see fit to otherwise direct.

The rates "lawfully in effect" during the suspension period were not the rates which were under suspension. Rather, the lawful rates were those which were in effect prior to the suspension. There is no warrant for saying that the Court below "held illegal precisely what the Interstate Commerce Act required." As stated in the beginning of this phase of the argument, the confusion existing is

brought about because the Appellants cannot eradicate from their minds the feeling that the order of the Commission set aside by the Court is nevertheless valid.

The "confusion and inconsistencies" feared by the Appellants do not result from the action of the Court below. The law cannot relieve against misapprehensions. Every time a rate order is set aside by the Courts, it inevitably results that those persons who have relied upon the order as being valid have done so to their detriment. Every time a tariff is misconstrued and an inapplicable rate assessed and collected the same confusion and inconsistency, here noted by the Appellants, exist. Such confusion is, however, brought about by the acts of the parties in misconstruing the applicable rate.

It is worthy of note, in passing, that the carbon black shippers were well aware of the situation. Six of them were present at the hearing and made affidavits in connection therewith (R. 26-32). One of them, Lee Cisneros, was a representative of the National Gas Products Association's Carbon Black Traffic Committee, which Association produces 95% of all the carbon black manufactured in the United States (R. 26). They knew when they made shipments after November 24 that the rates were under attack.

Government Appellants seem to feel that the injunction issued by the District Court is perhaps still in effect, despite the admitted fact that the suspension order expired by its own terms on April 23, 1956. New rates were filed

effective the following day and have been in effect since. An inspection of the opinion of the Court (R. 59) and its judgment (R. 61) will suffice to dispel any such fear. The District Court was careful to point out that it was simply restoring the matter to the status that it occupied just as though the void order had never been entered. The action of the Commission was not otherwise interfered with, nor its investigation hampered.[2]

Concluding argument under this point, Appellees submit that once it is established that the order under attack was void, the action of the District Court in granting relief was but the natural, and indeed, inevitable consequence of the invalidity of the order. No other judgment could have been rendered.

CONCLUSION

In the event this Court determines that a justiciable controversy here exists, it is respectfully submitted that the decision of the Court below is clearly correct, and it should be in all things affirmed.

Respectfully submitted,

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Attorney for Appellees.

February 20, 1957.

[2]Examination of the *Dixie Carrier* case, *143 F. Supp. 844*, cited as footnote 18 to Government Appellants brief, reveals clearly that the Court there was concerned not with suspension so much as with violation of the Fourth Section. This was the reason for the injunction in that case.

PROOF OF SERVICE

I, Ralph W. Currie, the Attorney for the Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 21st day of February, 1957, I served copy of the foregoing Brief on the several parties thereto as follows:

1. On the Southwestern Railroads, Appellants in No. 125, by mailing a copy in a duly addressed envelope with first-class postage prepaid to their Attorney of Record, Wm. R. McDowell, at his office, 914 Texas and Pacific Bldg., Dallas 2, Texas.

2. On the United States by mailing a copy thereof in a duly addressed envelope with first-class postage prepaid to Heard L. Floore, Esq., United States Attorney for the Northern District of Texas, at his office in the Federal Building at Dallas, Texas, and by mailing a copy in a duly addressed envelope with airmail postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D. C.

3. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope, with airmail postage prepaid to Robert W. Ginnane, Esq., its Chief Counsel, at the office of the Commission, Washington 25, D. C.

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No. 125. ARKANSAS & LOUISIANA MISSOURI RAILWAY CO. ET AL. *v.* AMARILLO-BORGER EXPRESS, INC., ET AL.; and

No. 224. UNITED STATES ET AL. *v.* AMARILLO-BORGER EXPRESS, INC., ET AL. Appeals from the United States District Court for the Northern District of Texas. (Probable jurisdiction noted, 352 U. S. 817.) Argued December 4–5, 1957. Decided March 11, 1957. *Per Curiam:* The judgment is vacated and the cases are remanded to the District Court with directions to dismiss the cause as moot. MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS dissent. *William R. McDowell* argued the cause for appellants in No. 125. With him on the brief was *J. T. Suggs. Robert W. Ginnane* argued the cause for the United States and the Interstate Commerce Commission, appellants in No. 224. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Hansen* and *H. Neil Garson. Ralph W. Currie* argued the cause and filed a brief for appellees. Reported below: 138 F. Supp. 411.